Supreme Court, U.S.
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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RANDALL A. TERRY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Attorney General of the State of New York filed a civil suit against Petitioner Randall A. Terry and others in the United States District Court for the Southern District of New York. The district court subsequently appointed the Attorney General of the State of New York as an interested prosecutor of a criminal contempt action against Petitioner arising out of the civil suit. The district court convicted Petitioner of criminal contempt, and the Court of Appeals for the Second Circuit affirmed.

Did the Second Circuit err in holding, in conflict with the Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits, and this Court's decision in *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987), that the Attorney General of the State of New York and his assistant could both actively prosecute the underlying civil case and prosecute the instant criminal contempt action?

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DECISIONS BELOW

The decision of the court of appeals is reported as *United States v. Terry*, 17 F.3d 575 (2d Cir. 1994). The denial of rehearing and rehearing *en banc* is unreported. No. 93-1440 (2d Cir. Apr. 22, 1994). The denial by the district court of the Motion for Disqualification of the Attorney General of the State of New York is reported as *United States v. Terry*, 806 F. Supp. 490 (S.D.N.Y. 1992). The decision of the district court holding Petitioner Randall A. Terry in criminal contempt is reported as *United States v. Terry*, 815 F. Supp. 728 (S.D.N.Y. 1993). The underlying preliminary injunction order of the district court is reported as *People of the State of New York v. Operation Rescue National*, 92 Civ. 4884 (RJW) (S.D.N.Y. July 13, 1992). The decision of the district court holding its preliminary injunction

to be constitutional is reported as *United States v. Terry*, 802 F. Supp. 1094 (S.D.N.Y. 1992).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment in this case on February 25, 1994. A petition for rehearing *en banc* was denied on April 22, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Miiitia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. V.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The first section of the third Article of the United States Constitution provides as follows:

> The judicial Power of the United States, shall be vested in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold the Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. art. III, § 1.

The first paragraph of the second section of the third Article of the United States Constitution provides as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to all Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2.

STATEMENT OF THE CASE

In this case the same two attorneys who were representing the plaintiff in a civil suit against Petitioner also prosecuted Petitioner for criminal contempt of an injunction obtained in that civil suit.

In the civil suit, *People of the State of New York v. Operation Rescue National*, 92 Civ. 4884 (RJW)

(S.D.N.Y. filed July 8, 1992), Robert Abrams, Attorney General of the State of New York, and Sanford Cohen, Assistant Attorney General of the State of New York served as counsel for plaintiff. Attorneys Abrams and Cohen filed suit on July 8, 1992, and simultaneously moved for a preliminary injunction to restrict abortion protest activities during the Democratic National Convention, in New York City from July 13 to July 17, 1992. On July 13, 1992, the district court issued the preliminary injunction which Petitioner, Randall A. Terry, is alleged to have violated. The injunction forbade

> presenting or confronting either Governor Bill Clinton or Senator Albert Gore with any fetus or fetuses or fetal remains in the City of New York or elsewhere in the Southern District of New York between 12:45 p.m. on July 13, 1992, and 12:00 midnight on July 17, 1992 . . . .

Preliminary Injunction, second decretal paragraph, clause 7.

Then-Governor Clinton (hereinafter "President Clinton"), who was in New York for the Democratic National Convention, was leaving his hotel on July 14, 1992, when Harley David Belew allegedly showed President Clinton a male fetus, 19 or 20 weeks old, in a plastic container. Although Randall Terry did not participate in this display, only Terry was prosecuted criminally for the alleged fetal display. No criminal penalty was assessed against Belew or anyone else allegedly involved in the incident.

The district court asked the United States Attorney's office to prosecute the criminal contempt case against Terry. U.S. Attorney Otto Obermaier declined to prosecute, based upon the position taken by the United States Department of Justice in a case then pending in this Court, *Bray v. Alexandria Women's Health Clinic*, 113

S.Ct. 753 (1993).[1] In *Bray*, the Department of Justice argued that 42 U.S.C. § 1985(3) could not serve as a basis for enjoining Operation Rescue protests.

On August 5, 1992, the district court appointed New York Attorney General Robert Abrams to prosecute the criminal contempt. Abrams and Assistant Attorney General Sanford Cohen thereafter exclusively handled the contempt prosecution. Both Abrams and Cohen were already counsel of record and actively participating in the parallel prosecution of the underlying civil suit at the time of their new appointment.

On August 12, 1992, the district court held a show cause hearing on the contempt charge. Terry pleaded not guilty. The New York Attorney General filed a charging instrument alleging violations of the preliminary injunction and 18 U.S.C. §§ 2 and 401(3). Petitioner Terry moved to disqualify the New York Attorney General from prosecuting the criminal contempt charges, citing this Court's decision in *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987), and pointing to particular evidence showing the impropriety of having attorneys Abrams and Cohen prosecute both the civil action and the criminal contempt.

This evidence showed Attorney General Abrams' inappropriate underlying interest in the prosecution of Terry. Much of this inappropriate interest stemmed from the central fact that Abrams and Terry have diametrically opposed—and outspoken—positions on the issue of abortion. *Compare* November 18, 1992, Hearing Transcript at 12 (Randall Terry test.); *with id.* at 80 (Robert Abrams test.). A confrontation occurred between Randall

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[1] In *Bray v. Alexandria Women's Health Clinic*, this Court held that neither women seeking abortions nor women generally constituted a class for purposes of asserting a claim for relief under Title 42 U.S.C. § 1985(3), and, consequently, such classes could not state a claim for relief against Operation Rescue protest activities under Title 42 U.S.C. § 1985(3).

Terry and Robert Abrams at a pro-abortion demonstration in Washington, D.C. Abrams was both a participant and speaker at this pro-abortion rally. *Id.* at 76 (Robert Abrams test.). Abrams and his wife flew to Washington, D.C., for the march. After Abrams spoke to the gathering, he and his wife had to move quickly to position themselves at the front of the ensuing parade. *Id.* at 63 (Diane Abrams test.).

Jeff White and Randall Terry testified that after Abrams spotted Terry standing along the parade route, Abrams chanted "you are going to lose" at Terry and then emphasized his enmity toward Terry by lodging his thumbs in his ears, wriggling his fingers, and sticking out his tongue. *Id.* at 13-14 (Randall Terry test.); *id.* at 46-47 (Jeff White test.). Although attorneys Abrams and Cohen at first admitted to the district court that some type of exchange had occurred, *see* November 20, 1992, Opinion at 5 (App. at 34a), September 24, 1992, Hearing Transcript at 21-22, Abrams later contradicted that admission, testifying that he had no interaction with Terry. November 18, 1992, Hearing Transcript at 78 (Robert Abrams test.). The district court found that "neither the prosecutor nor the defendant has established that his version of the events of April 5, 1992 is true." November 20, 1992, Opinion at 17 (App. at 45a).

Abrams also used his prosecution of Randall Terry as a campaign theme to bolster his unsuccessful bid for the United States Senate. November 18, 1992, Hearing Transcript at 81-83. The Attorney General used the Terry prosecution for his personal political purposes in the media, calling Terry's protests, "ugly publicity stunts and cheap and revolting tactics." Also, he stressed that unlike Geraldine Ferraro, he "took on Operation Rescue in Buffalo, and she didn't." November 18, 1992, Hearing Transcript at 86 & 88.

The district court found that Abrams' use of the prosecution of Terry for political gain was an undisputed fact. November 20, 1992, Opinion at 18 (App. 46a).

On November 18, 1992, the district court denied Terry's motion to disqualify the Attorney General as an interested prosecutor because of his contemporaneous involvement in the underlying civil case. On November 20, 1992, the district court issued a written opinion in support of this previous order. App. 32a.

At the criminal trial, the key substantive evidence used to convict Terry (copies of his radio broadcast) was evidence obtained through civil discovery in the underlying action. The depositions of Patrick Mahoney and Cindy Terry, obtained in the underlying civil proceeding, were entered into the record. *See* November 20, 1992, Hearing Transcript at 159 and 164.

On March 5, 1993, the district court announced its verdict finding Terry to have violated Clause 7 of the injunction (Count One of the Attorney General's Notice of Charge). On March 10, 1993, the court issued its written opinion in accordance with its previous verdict. App. at 48a. The court found that Terry had violated 18 U.S.C. §§ 2 and 401(3) by "aiding, abetting, counseling, commanding, inducing, procuring or causing" Belew to act in violation of Clause 7. *United States v. Terry*, 815 F. Supp. 728, 734-35 (S.D.N.Y. 1993) (App. 67a). The court held that Terry was guilty of criminal contempt, whether or not Belew was convicted of any crime. *Id.* at 730 n.1 On June 11, 1993, the district court sentenced Terry to 5 months in jail and levied a special assessment of ten dollars. *See* App. 68a.

The Second Circuit affirmed Terry's contempt conviction. *United States v. Terry*, 17 F.3d 575 (2d Cir. 1994).

In *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987), (hereinafter "*Young*"), this Court held that it is improper for counsel for the civil plaintiff to prosecute a related criminal contempt. Nevertheless, in *Terry*, the Second Circuit held that *Young* "does not

automatically disqualify government attorneys" from the dual representation forbidden in *Young*. 17 F.3d at 578 (App. 5a). The Second Circuit held that courts must instead "examine the particular facts of the case" to assess error. *Id.* The Second Circuit also held that the pecuniary interest of the Attorney General was *de minimus, id.*, that there were no "ongoing activities in the underlying civil action," *id.*, that the personal animus and use of the prosecution for political purposes issue was irrelevant, *id.* at 579, and that although materials were obtained through civil discovery and used against Terry in the criminal matter, there was no harm done because the materials *could have been* properly obtained through criminal discovery, *id.* at 578.

The Second Circuit denied a petition for rehearing. *United States v. Terry*, No. 93-1440 (2d Cir. April 22, 1994).

REASONS FOR GRANTING THE WRIT

In *Young*, this Court held that "counsel for a party that is a beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order," *id.* at 809.[2] Attorney General Abrams and Assistant Attorney General Cohen represent the plaintiff in the underlying civil action. The criminal contempt charge on which Terry was convicted arose out of an alleged violation of a preliminary injunction obtained for the plaintiff in the civil action by attorneys Abrams and Cohen. The appointment of attorneys Abrams and Cohen as exclusive counsel to prosecute the criminal contempt charge therefore, flagrantly violated *Young*.

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[2] Seven Justices—Brennan, Marshall, Blackmun, Powell, Stevens, O'Connor, and Chief Justice Rehnquist—joined this portion of *Young*. Justice Scalia concurred on the basis that federal courts have no constitutional authority to appoint counsel, other than the U.S. Attorney, to prosecute criminal contempts. Justice White dissented.

The Second Circuit has become a law unto itself, in conflict both with the governing decision of this Court and the decisions of other federal circuits.

I. THE DECISION OF THE SECOND CIRCUIT CONCERNING PARALLEL PROSECUTION OF CIVIL AND CRIMINAL CASES CONFLICTS WITH THIS COURT'S DECISION IN *YOUNG v. UNITED STATES EX. REL. VUITTON ET FILS.*

To affirm the conviction below, the Second Circuit disregarded *Young*'s prophylactic rules, instead the Second Circuit indulged in a fact-based analysis of whether Attorney General Abrams was sufficiently "interested" to come within the proscriptions of *Young*. *See generally U.S. v. Terry*, 17 F.3d at 577-578. This Court, however, unequivocally condemned the use of "counsel for an interested party," *Young*, 481 U.S. at 806, as prosecutor for criminal contempt proceedings. That decision reflected this *precautionary* concern about the *inherent* conflict of interest between counsel's obligations to the interested party, as client, and, to the United States Government, as representative of the public.

> As should be apparent, the fact that the judge makes the initial decision that a contempt prosecution should proceed is not sufficient to quell concern that prosecution by an interested party may be influenced by improper motives. A prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity. These decisions, critical to the conduct of a prosecution, are all made outside the supervision of the court . . .

> . . . In a case where a prosecutor represents an interested party . . . the ethics of the legal profession *require* that an interest other than the Government's be taken into account. *Given this inherent conflict in roles, there is no need to speculate whether the prosecutor will be subject to extraneous influence.*

Id. at 807 (footnote omitted, emphasis added in part). *Young* therefore established, "in the exercise of our supervisory power," a flat rule barring federal courts from "appointing as prosecutors counsel for an interested party in the underlying civil litigation." *Id.* at 802.

In the present case, it is uncontested that attorneys Abrams and Cohen acted both as exclusive counsel for plaintiff in the underlying civil suit *and* as prosecutors for the criminal contempt charges. The violation of *Young* could not be more patent.

The Second Circuit nonetheless refused to find erroneous the appointment of Abrams and Cohen as contempt prosecutors. Declaring that *Young* "does not automatically disqualify" the New York Attorney General and his assistant, the Second Circuit held that "a court must examine the particular facts of the case" to determine if a violation of *Young* occurred. 17 F.3d at 578 (App. 5a). But to embrace a standard of case-by-case analysis, as the Second Circuit did, is to defeat the very point of the holding in *Young*. Counsel for an interested party have an "inherent conflict of roles," *Young*, 481 U.S. at 807, no matter how scrupulous their ethical standards may be, and no matter how "clean" the relevant circumstances.

The Second Circuit's suggestion, 17 F.3d at 577, that *Young* should not apply because the interested party in this case is a State, or because the appointed attorneys are government attorneys, *id.* at 578, is inconsistent with *Young*. The attorney appointed to prosecute a criminal contempt must "represent the United States, not the party that is the beneficiary of the court order allegedly vio-

lated." *Young*, 481 U.S. at 804. The interests of the State of New York and the United States are obviously not necessarily congruent, as illustrated by litigation between the two sovereigns. *E.g., New York v. United States*, 112 S. Ct. 2408 (1992). Indeed, the very premise of our federalism system is that the state and federal sovereigns have distinct interests. Where, as here, the state is involved in civil litigation with private parties, the state's ability to step into the shoes of the United States as criminal prosecutor cannot be presumed.

In short, the Second Circuit's decision cannot be squared with this Court's ruling in *Young*.[3] Either *Young*'s bright-line test must go—opening up a vista of case-by-case litigation over what circumstances permit abrogation of the bar to dual representation, with the attendant uncertainty cast over criminal contempt proceedings—or else the decision below must go.

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[3] The Second Circuit's decision amounts to a blatant refusal to apply a standard which it has already acknowledged exists. In *Sassower v. Sheriff of Westchester County*, 824 F.2d 184 (2d Cir. 1987), the Second Circuit reiterated this Court's *Young* standards which should have been, but were not, allied in this case:

> [T]he [*Young*] Court concluded that it was *fundamental error* that 'undermines confidence in the integrity of the criminal proceeding,' *id.* at 2139, for a court to appoint an attorney for an interested party as a special prosecutor where that prosecutor exercises broad discretion to decide (1) who and how to investigate; (2) what evidence to gather; (3) who to call as witnesses and who to charge with that offense; (4) whether and on what terms to enter into plea bargains; and (5) who should receive immunity.

Sassower, 824 F.2d at 191 (emphasis added).

II. THE DECISION OF THE SECOND CIRCUIT, ALLOWING THE SAME COUNSEL TO PURSUE PARALLEL PROSECUTION OF CIVIL AND CRIMINAL CASES CONFLICTS WITH DECISIONS OF THE FOURTH, FIFTH, SIXTH, SEVENTH, NINTH, AND ELEVENTH CIRCUITS.

The Second Circuit held that an attorney for an interested party involved in a civil prosecution may serve as sole or lead counsel in a parallel criminal contempt prosecution. This holding directly conflicts with all of the federal circuits which have addressed this issue.[4]

As the Sixth Circuit said in *Polo Fashions v. Stock Buyers Intern.*, 760 F.2d 698 (6th Cir. 1985):

> Where counsel for an interested party is appointed pursuant to Rule 42(b) he or she cannot conduct the criminal contempt proceedings, but may assist the United States Attorney assigned to the prosecution. If the United States Attorney should decline to prosecute upon request, then the district court may appoint one or more disinterested attorneys to do so. In that event again, counsel for an interested party may be appointed to assist. *However, in this circuit an attorney for a party in underlying litigation may not conduct criminal contempt proceedings as sole or primary counsel.*

Id. at 705 (emphasis added). The Second Circuit's decision here conflicts with the Sixth Circuit's *per se* rule forbidding parallel prosecution.

Both the Fifth Circuit and the Ninth Circuit have ruled that *Young* applies to government attorneys. *U.S. ex rel., S.E.C. v. Carter*, 907 F.2d 484 (5th Cir. 1990); *F.T.C. v. American Nat. Cellular*, 868 F.2d 315 (9th Cir. 1989).

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[4] The Second Circuit has consistently refused to find that parallel prosecution was anything but harmless error. *U.S. v. Young*, 780 F.2d 179 (1985), *rev'd*, 481 U.S. 787 (1987); *Sassower* (acknowledging *Young* but refusing to find dual prosecution constituted reversible error); *Terry* (instant case; same).

In *Carter*, the Fifth Circuit also held that a government prosecutor cannot conduct parallel civil and criminal proceedings without running afoul of *Young*. In reversing the criminal contempt convictions in that case, the *Carter* court stated:

> In *Young*, the special prosecutors' competing interest stemmed from their representation of Vuitton, a purely private entity. In the present case, the competing interest stemmed from the special prosecutors' concurrent representation of a government agency—the SEC. Nonetheless, *Young* guides our review of the district court's appointment of SEC attorneys to serve as special prosecutors. Specifically, we look to the lesson of *Young*, which is that courts should not appoint special prosecutors who have an extraneous interest in the case that may create '*the appearance of impropriety*.'

Carter, 907 F.2d at 484 (citations omitted). *See also In re Davidson*, 908 F.2d 1249, 1251 (5th Cir. 1990) ("where, as here, there is a *Young* violation, harmless error analysis is inappropriate"); *Nasco, Inc. v. Calcasieu Television and Radio*, 894 F.2d 696, 707 (5th Cir. 1990) ("appointment of the opposing counsel in the underlying litigation to prosecute a criminal contempt proceeding violate[s] due process"). *See also E.E.O.C. v. Sears*, 839 F.2d 302, 359 (7th Cir. 1988) ("It is apparent that although the Justices [in *Young*] varied in their analyses of the conflict problem, they unanimously disapproved of the practice of appointing the counsel of an interested party to prosecute a criminal contempt case"); *Midway Manufacturing Co. v. Kruckenberg*, 828 F.2d 13 (11th Cir. 1987) (*per curiam* reversal of contempt conviction, based on *Young*).

In *Nat. Cellular*, the Ninth Circuit—like the Fifth Circuit in *Carter*—held that *Young* applies to *United States* government attorneys, *Nat. Cellular*, 868 F.2d 319-320, who in theory do not face the conflict of representing two different parties. Plainly, *Young* applies with greater

force to attorneys representing a *different* sovereign, *viz.*, a state like New York. Thus, the "two factors" term adopted in *Nat. Cellular*, 868 F.2d at 320, is inapplicable in the case at bar. The decision below conflicts directly with the Ninth Circuit's test for *federal* agency attorneys as well. Under that test,

> [1.] First, the involvement of the U.S. Attorney's office is relevant. The prospect of interested decisionmaking and the appearance of impropriety is substantially lessened where the U.S. Attorney retains control of the prosecution in which the agency attorneys participate . . . [2.] Second, the extent of the particular agency attorneys' involvement in the underlying civil litigation obviously is relevant in assessing the propriety of their participation as special prosecutors.

868 F.2d at 320.[5] In the case at bar, (1.) the U.S. attorney declined to prosecute the criminal contempt and

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[5] The holding in *Nat. Cellular* coincides with this Court's response in *Young*, to the argument that civil litigants should be allowed to prosecute parallel criminal contempt cases because they are most familiar with the case:

> That familiarity may be put to use in *assisting* a disinterested prosecutor in pursuing the contempt action, but cannot justify permitting counsel for the private party to be in control of the prosecution.

Young, 481 U.S. at 807 n.17 (emphasis in original). In an extension of this reasoning, the Fourth Circuit in *Person v. Miller*, 854 F.2d 656, 663 (4th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989), outlined the role interested counsel might have with an impartial prosecutor:

> We . . . read *Young* at least implicitly to approve (or certainly not to forbid) the practice of allowing private counsel for interested parties to participate formally with government counsel in the prosecution of contempt citations so long as that participation (1) has been approved by government counsel; (2) consists solely of rendering assistance in a subordinate role to government counsel; and (3) does not rise in practice to the level of effective control of the prosecution.

The Attorney General's exclusive control of the present case violates all three requisites of the *Person* standard.

exercised no control over that prosecution, and (2.) the attorneys appointed to prosecute the contempt (Abrams and Cohen) were the exclusive counsel for plaintiff in the underlying civil litigation, and served as exclusive counsel in the contempt prosecution. Thus, the appointment in this case blatantly fails even the Ninth Circuit's test.

As the Fifth Circuit explained in its application of the *Nat. Cellular* test:

> [T]he Ninth Circuit held that 'the extent of the particular agency attorneys' involvement in the underlying civil litigation obviously is relevant in assessing the propriety of their participation as special prosecutors.' *Id.* at 320. In *Amer. Nat'l Cellular, the attorneys for the FTC in the civil suit were not involved in the criminal contempt prosecution.* The SEC attorneys who prosecuted the instant criminal contempt proceedings were deeply involved as SEC attorneys in the underlying civil action from the signing of the civil contempt against Litchfield through representing the SEC at the civil contempt hearings. *The U.S. Attorney's lack of control over this prosecution and the SEC attorneys' extensive involvement in the underlying civil action indicate that the district court committed prejudicial error in appointing the SEC to serve as special prosecutor for the criminal contempt proceeding.*

Carter, 907 F.2d at 488 (emphasis added). In sum, the Second Circuit stands alone in the notion that a government prosecutor can be the primary active prosecutor in parallel civil and criminal cases. This Court should grant review to settle the conflict the Second Circuit has created.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

In view of the Second Circuit's clear departure from a decision of this Court, and in view of the fact that the Second Circuit stands alone in pursuing this deviant course, in conflict with the consistent view of every other federal circuit to consider the issue, this Court should consider disposing of this petition by summary reversal of the judgment below under Rule 6.1.

Respectfully submitted,

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July 21, 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 658—August Term 1993

(Argued November 22, 1993 Decided Feb. 25, 1994)

Docket No. 93-1440

UNITED STATES OF AMERICA,
Appellee,

v.

RANDALL A. TERRY,
Defendant-Appellant.

Before: MESKILL and WALKER, *Circuit Judges*, and MOTLEY,* *District Judge.*

WALKER, *Circuit Judge:*

Defendant Randall A. Terry appeals from a judgment entered on June 14, 1993 after a bench trial in the United States District Court for the Southern District of New York (Robert J. Ward, *Judge*), convicting him of criminal contempt, in violation of 18 U.S.C. §§ 2(b) and 401 (3), arising from his breach of the district court's July 13, 1992 preliminary injunction. *United States v. Terry*, 815 F. Supp. 728 (S.D.N.Y. 1993) (*"Terry III"*).

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* Honorable Constance Baker Motley, United States District Judge for the Southern District of New York, sitting by designation.

The actions leading to the criminal contempt conviction from which this appeal was taken lay grounded in the highly charged societal debate over abortion rights. This appeal, however, is unconcerned with this debate. Rather, it is confined to the questions of whether, under the circumstances presented, one who preliminarily was enjoined by an order of the district court could freely disregard that order and whether there was error in the process that led to his conviction for criminal contempt.

The preliminary injunction was issued in connection with a suit brought in early July 1992 by the People of the State of New York, represented by New York State Attorney General Robert Abrams, against Terry, Operation Rescue National (a pro-life organization of which Terry claims to be the founder), and various other defendants. The objective of the suit was to enjoin defendants from violating various federal and state laws by blocking access to facilities that perform abortions, harassing persons entering these facilities, and interfering with the rights of delegates attending the Democratic National Convention. The injunction, which was issued on July 13, 1992, enjoined defendants from, *inter alia,*

> presenting or confronting either Governor Bill Clinton or Senator Albert Gore with any fetus or fetuses or fetal remains in the City of New York or elsewhere in the Southern District of New York between [12:45 p.m. on July 13, 1992] and 12:00 midnight on July 17, 1992 . . . .

It also provided that defendants:

> shall make good faith efforts to instruct all organizations and individuals they believe to be planning to participate in any of the activities enumerated in clauses (1) through (7) of the second decretal paragraph above not to engage in the proscribed activities . . . .

After a bench trial, the district court found Terry guilty of violating the first quoted paragraph based upon evidence that, notwithstanding the paragraph's terms, he caused an associate to present then-Governor, now President Clinton with a fetus on the morning of July 14, 1992. The court concluded that the Government failed to establish that Terry had violated the second quoted paragraph. The court sentenced Terry to five months' imprisonment and ordered a special assessment of $10.

On appeal, Terry contends: (1) that the district court violated his due process right to a distinterested prosecutor by appointing Attorney General Abrams to be the prosecutor in the criminal contempt proceeding; and (2) that his contempt conviction is invalid because the underlying injunction did not prohibit his activities and, in any event, unconstitutionally burdened his First Amendment rights. We find both contentions to be without merit.

I. *Appointment of the New York State Attorney General as Prosecutor*

Terry first argues that the Attorney General should not have served as prosecutor because he was counsel of record in the underlying civil litigation and because he harbored a personal bias against Terry. We reject these arguments substantially for the reasons stated by the district court in its denial of Terry's motion to disqualify Mr. Abrams prior to trial. *United States v. Terry*, 806 F. Supp. 490 (S.D.N.Y. 1992) ("*Terry II*").

A. *The* Vuitton *Argument*

In arguing that the Attorney General should not have served as prosecutor because of his role in the civil litigation, Terry relies primarily on *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). *Vuitton* focused on the danger of entrusting the coercive powers of the state to counsel for a private litigant, and held that

counsel for a party that is the beneficiary of a court order may not be appointed as a prosecutor in a contempt action alleging violation of that order. Unlike the usual *Vuitton* situation, this case involves the appointment of a government attorney as the contempt prosecutor. Like the United States Attorney, who was first asked by the district court to prosecute the contempt charges but declined, the Attorney General of the State of New York represents a sovereignty and is presumed to act with a sense of impartiality.

Despite this presumption, two circuits have held that *Vuitton* concerns may be implicated by appointment of a government attorney as prosecutor in a contempt proceeding. *See United States ex rel. SEC v. Carter,* 907 F.2d 484 (5th Cir. 1990); *FTC v. American Nat'l Cellular,* 868 F.2d 315 (9th Cir. 1989). *Carter* held that the appointment of SEC attorneys to prosecute appellants' violation of receivership injunctions entered in a suit brought by the SEC transgressed *Vuitton* principles, where the SEC attorneys who conducted the prosecution also litigated the underlying civil action and their prosecution was not supervised by the United States Attorney's Office. The court was further concerned by the prospect that the SEC attorneys had not disinterestedly pursued appellant's convictions, as evidenced by the fact that they overstated and misrepresented appellants' wrongdoing in their appellate briefs.

In *American National Cellular,* the Ninth Circuit ruled that appointment of government lawyers can lead to reversible error under *Vuitton* in certain circumstances, such as where an attorney's involvement in the underlying civil litigation clouds his judgment while prosecuting the contempt action. The Ninth Circuit found, however, that under the facts of the case before it, the involvement of FTC attorneys in the prosecution of appellant's contempt charges did not result in reversible error. *American Nat'l Cellular,* 868 F.2d at 320. The Ninth Circuit relied on the fact that the United States Attorney participated in

the contempt prosecution and that the FTC attorneys who litigated the underlying civil action were only marginally involved, if at all, in the prosecution.

We agree with the Ninth Circuit that *Vuitton* does not automatically disqualify government attorneys who bring a civil action from serving as special prosecutors in a subsequent contempt proceedings, and that where a case involves appointment of a government attorney, the court must examine the particular facts of the case to determine if reversible error has occurred. *See id.* at 319. In the present case, we conclude, based on our review of the record, that the Attorney General's involvement with the underlying civil action did not present an actual or apparent conflict of interest requiring his disqualification. Several facts are particularly relevant to our decision. First, the only financial interest the Attorney General had in the underlying civil litigation (the possibility that attorneys' fees would be paid, not to the Attorney General or his office, but to the general coffers of the State of New York) was too remote to implicate a conflict. Second, the Attorney General could not profit financially from the criminal contempt prosecution since any fine imposed would be paid to the United States and the district court determined before the prosecution began that it would not award attorney's fees. Third, at the time of the prosecution, the civil contempt charges against Terry had been dismissed.

Fourth, and quite significant in our view, at the time of the contempt prosecution there were no ongoing activities in the underlying civil action that could cloud the Attorney General's judgment in the criminal case or exert undue pressure on Terry. Although we learned at oral argument that the district court has recently ordered the parties in the civil case to submit a schedule for completion of discovery and filing of pre-trial orders or motions for summary judgment, we do not believe this renewed activity in the civil action calls into question the Attorney General's

impartiality during the prior contempt proceedings. It is undisputed that the civil case had been inactive since the time the preliminary injunction was issued until the court's recent order. The Attorney General was therefore not involved in the type of simultaneous activity that would give him an unfair advantage in either proceeding. As a final point, we conclude that the Attorney General's dual role could not have led to discovery abuse since any discovery obtained in the criminal proceeding, in which there was no grand jury, would be as readily obtainable in the underlying civil litigation.

Terry also argues that the potential for abuse with a dual role prosecutor is demonstrated by the fact that in his criminal trial, the Attorney General used materials obtained through discovery in parallel civil contempt proceedings of Terry's codefendants. The Attorney General's concurrent prosecution of the civil and criminal contempt charges is not a concern addressed by *Vuitton*. The criminal proceeding does not involve vindication of an order issued in the civil contempt proceedings; rather, both proceedings seek vindication of the injunction issued in the underlying civil litigation. *Vuitton* does not suggest that different attorneys need to be appointed to prosecute parallel contempt proceedings. In addition, the evidentiary materials in question (deposition testimony of two witnesses and tapes of Terry's radio talk show programs) provided no unfair advantage to the Attorney General in the criminal case since they would have been available to any prosecutor through the criminal discovery process. Indeed, the Attorney General was prepared to call the two deponents as witnesses at the criminal trial, but defense counsel stipulated to admission of their civil deposition transcripts. Thus, there was no potential for the Attorney General to achieve a discovery advantage by his role in the civil contempt proceedings and, in fact, none was achieved.

B. *Personal Bias*

Terry also argues that Attorney General Abrams bore a personal enmity against him requiring his disqualification. Terry relies on an alleged verbal exchange between the two men in April of 1992 and on Mr. Abrams's campaign commercials referring to his battle against "anti-abortion extremists." We are unable to fault the district court's assessment that the first occurrence was an innocuous event of no significance to the prosecution and that the commercials simply reported facts and Mr. Abrams's characterization of certain pro-life groups. Moreover, any inference that the prosecution was motivated by Mr. Abrams's political ambitions is controverted by the fact that it was the district judge, not the Attorney General, who initiated Terry's prosecution for criminal as opposed to civil contempt. Furthermore, Mr. Abrams became involved as prosecutor only in response to the district court's request that he serve in this role after the United States Attorney for the Southern District of New York declined the court's invitation to prosecute the case.

Finally, we note that a defendant who claims that a prosecutor bore a personal bias against him is required to show that he was prejudiced by the prosecutor's involvement. *United States v. Wallach*, 935 F.2d 445, 460 (2d Cir. 1991) (citing *Wright v. United States*, 732 F.2d 1048, 1056 n.8 (2d Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985)). Here, Terry has failed to demonstrate how he was detrimentally affected by the appointment of Mr. Abrams as opposed to some other prosecutor. Terry does not contest the district court's factual findings or the sufficiency of the evidence leading to his conviction. We have previously found unconvincing the claim that "with another prosecutor, [the defendant] might have undeservedly escaped indictment and consequent conviction for crimes of which he was properly found to be guilty." *Wright*, 732 F.2d at 1058.

II. *The Preliminary Injunction*

Terry also contends that his contempt conviction is invalid because the district court's preliminary injunction is unconstitutional, and alternatively, because the injunction did not prohibit his activities.

A. *Constitutionality*

We reject Terry's contention that the injunction is unconstitutional for the same reason the trial court denied his motion to present constitutional arguments as a defense at his criminal trial. *United States v. Terry*, 802 F. Supp. 1094, 1101 (S.D.N.Y. 1992) ("*Terry I*"). It is well established that a defendant generally is barred from collaterally attacking the constitutionality of a court order as a defense to his criminal contempt prosecution. *Walker v. City of Birmingham*, 388 U.S. 307, 314-15 (1967); *American Nat'l Cellular*, 868 F.2d at 317; *Terry I*, 802 F. Supp. at 1101 (and cases cited therein). The appropriate method for challenging the validity of a court order is to petition to have the order vacated or amended. *In re Providence Journal Co.*, 820 F.2d 1342, 1346 (1st Cir. 1986), *modified on reh'g en banc*, 820 F.2d 1354 (1st Cir. 1987), *cert. dismissed*, 485 U.S. 693 (1988). Here, Terry did not appeal the issuance of the preliminary injunction as unconstitutional despite the district court's express advice to him at the injunction hearing that this avenue was open to him. *See Terry I*, 802 F. Supp. at 1102 n.7 (excerpts from transcript of injunction hearing detailing district court's instructions regarding appeal process). He is thus precluded from attacking the injunction's constitutionality at this stage of the proceedings.

While an exception to the prohibition against collateral attack exists where the injunction is "transparently invalid," the preliminary injunction in this case was not "so far in excess of [the court's] authority that it ha[d] no right to expect compliance." *Providence Journal Co.*, 820

F.2d at 1347. On the contrary, the court issued a tailored order aimed at preventing specifically threatened violations of federal and state law. Furthermore, we agree with the district court that even the "transparently invalid" exception requires a showing that the party made a "good faith effort to seek emergency relief from the appellate court." *Terry I*, 802 F. Supp. at 1101-02 (quoting *Providence Journal Co.*, 820 F.2d at 1355). It is undisputed that Terry has failed to make such a showing.

B. *Scope*

As a final point, we are unpersuaded by Terry's argument that his conduct was not prohibited by the injunction. Terry contends that the injunction did not expressly forbid aiding and abetting another to perform the proscribed act of presenting fetal remains to then-Governor Clinton or then-Senator Gore. It is axiomatic in federal criminal law that when certain conduct is criminally proscribed by a statute, the proscription extends to the aider and abettor under 18 U.S.C. § 2(b). In this case, 18 U.S.C. § 401(3) makes it an offense against the United States to violate a federal court's order, and 18 U.S.C. § 2(b) provides that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal." Terry's alleged ignorance of these statutes is no defense to his criminal contempt charges. *See Cheek v. United States*, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."); *United States v. Berardelli*, 565 F.2d 24, 30 (2d Cir. 1977) (ignorance of statute that makes it a crime to consciously disregard an order of the court is no defense to criminal contempt charge).

Terry also argues that his activity was protected by a clause in the injunction which provides that, "nothing

in the Court's Order should be construed to limit defendants and those acting in concert with them from exercising their legitimate First Amendment rights." As Judge Ward correctly determined, this provision did not nullify the effect of the clause in the injunction that prohibited Terry from presenting fetal remains to then-Governor Clinton. Moreover, Terry had ample opportunity to clarify any misunderstanding about the interrelationship of these two provisions at the injunction hearing or upon an immediate appeal, yet failed to do so. His willful violation of the court's order is not excused by post-hoc allegations that he was confused about the scope of terms that are clear and unambiguous.

For the reasons set forth above, the judgment of the district court is affirmed.

APPENDIX B

[Filed Aug. 12, 1992]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 92 Cr. Misc. #1 Pg 46

UNITED STATES OF AMERICA

-v-

RANDALL TERRY,

Defendant.

ORDER TO SHOW CAUSE

WHEREAS the Court has reviewed the annexed affidavit of Sanford M. Cohen, Assistant Attorney General in the Office of Robert Abrams, Attorney General of the State of New York, who, pursuant to Rule 42 of the Federal Rules of Criminal Procedure, was appointed by this Court on August 5, 1992 to prosecute this matter; the annexed affidavit of Michael R. Finamore, Law Department Investigator II with the Office of the Attorney General; and the annexed Notice of Charge; and is thoroughly familiar with the foregoing; and

WHEREAS RANDALL TERRY, the defendant, is charged with criminal contempt punishable by a maximum sentence of six months imprisonment and a fine of not more than five thousand dollars, as more fully set forth in the accompanying Notice of Charges and affidavit of Sanford M. Cohen, it is hereby:

ORDERED pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure that RANDALL TERRY,

the defendant, show cause before this Court on the 12th day of August, 1992 at 2:30 p.m in Courtroom 1505 of the United States Courthouse, Foley Square, New York, New York, why he should not be adjudged in criminal contempt of this Court's July 13, 1992 Preliminary Injunction in *People of the State of New York v. Operation Rescue National, et al.*, 92 Civ. 4884 (RJW), which (1) enjoined defendant Terry from "presenting or confronting . . . Governor Bill Clinton . . . with any fetus or fetuses or fetal remains in the City of New York or elsewhere in the Southern District of New York between [July 13, 1992 at 12:45 p.m.] and 12:00 midnight on July 17, 1992" and (2) enjoined defendant Terry to "make good faith efforts to instruct all . . . individuals [he] believe[d] to be planning to participate [in presenting Governor Clinton with a fetus or fetal remains] not to engage in the proscribed activit[y]," as more fully set forth in the accompanying Notice of Charge; and

IT IS FURTHER ORDERED that delivery of this Order and accompanying papers to Jay Alan Sekulow, attorney for defendant Terry, on or before the 12th day of August, 1992 prior to 2:30 P.M. shall constitute good and sufficient service thereof.

Dated: New York, New York
August 12, 1992

Time: 10:00 A.M.

SO ORDERED:

/s/ Robert J. Ward
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Cr. Misc. #1 Pg. 46 (RJW)

UNITED STATES OF AMERICA

-against-

RANDALL TERRY,

Defendant.

OPINION

WARD, District Judge.

Defendant Randall Terry has served and filed nine separate motions in connection with his forthcoming criminal contempt trial before this Court.

Defendant's motions are:

1. Motion to Take Deposition of Governor Bill Clinton;
2. Motion to Recuse;
3. Motion to Disqualify the Attorney General from Appointment as Prosecutor;
4. Motion for Bill of Particulars;
5. Motion to Amend Order to Show Cause;
6. Motion to Dismiss Count Two of Notice of Charge;
7. Motion to Present Constitutional Arguments;

8. Motion for Discovery Pursuant to Rule 16, Fed. R. Crim. P.; and

9. Motion for Material Pursuant to *Brady* v. *Maryland*, 373 U S. 83 (1963).

The New York State Attorney General ("the Attorney General"), who was appointed as prosecutor by this Court pursuant to Rule 42, Fed. R. Crim. P., opposes the first seven motions, does not oppose the eighth motion, and asserts that the ninth motion should be denied, without prejudice, as premature.

At oral argument on September 24, 1992, the Court disposed of eight of defendant's nine motions [1] and deferred a decision on one motion, the Motion to Disqualify the Attorney General from Appointment as Prosecutor, pending further submissions to the Court. With reference to two of the motions decided at oral argument, i.e. the

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[1] The motions were disposed of as follows:

— The Motion to Take the Deposition of Governor Bill Clinton was denied without prejudice to renewal after the government has completed the presentation of its direct case at trial;

— The Motion to Recuse was denied;

— The Motion for Bill of Particulars was denied, except as consented to by the Attorney General;

— The Motion to Amend the Order to Show Cause was denied without prejudice to renewal after the government has completed the presentation of its direct case at trial;

— The Motion to Dismiss Count Two of the Notice of Charge was denied without prejudice to renewal after the government has completed the presentation of its direct case at trial;

— The Motion to Present Constitutional Arguments was denied;

— The Motion for Discovery Pursuant to Rule 16, Fed. R. Crim. P. was granted; and

— The Motion for Material Pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), was granted in part and denied in part.

Motion to Recuse and the Motion to Present Constitutional Arguments, the Court indicated that it would file reasoned decisions shortly. This Opinion contains those reasoned decisions.

I. BACKGROUND

After a hearing held on July 13, 1992 ("the July 13 Hearing"), this Court issued a preliminary injunction in *People of the State of New York* v. *Operation Rescue National,* 92 Civ. 4883 (RJW) (the "Preliminary Injunction"), which provided that the defendants in that action, including Randall Terry, were enjoined from, *inter alia,*

> presenting or confronting either Governor Bill Clinton or Senator Albert Gore with any fetus or fetuses or fetal remains in the City of New York or elsewhere in the Southern District of New York between [12:45 P.M. on July 13, 1992] and 12:00 midnight on July 17, 1992 . . . .

Preliminary Injunction, Second Decretal Paragraph, Clause (7).

The Third Decretal Paragraph of the Preliminary Injunction indicated:

> IT IS FURTHER ORDERED that nothing in the Court's Order should be construed to limit defendants and those acting in concert with them from exercising their legitimate First Amendment rights . . . .

In addition, the Fourth Decretal Paragraph of the Preliminay Injunction provided:

> IT IS FURTHER ORDERED that defendant organizations and their officers and agents, and all individual defendants and those acting in concert with them, shall make good faith efforts to instruct all organizations and individuals they believe to be planning to participate in any of the activities enumerated in

> clauses (1) through (7) of the second decretal paragraph above not to engage in the proscribed activities . . . .

During the July 13 Hearing, this Court informed Terry's counsel, Raymond L. Mylott, Jr., that he could immediately appeal the granting of the Preliminary Injunction.[2] No appeal was filed on either July 13 or July 14, 1992.

The government alleges that, on the morning of July 14, 1992, Governor Bill Clinton was presented or confronted with a fetus in the vicinity of the hotel at which he was staying in Manhattan and that, on the basis of this occurrence and related incidents, Randall Terry violated the terms of the Preliminary Injunction.

At a contempt hearing held on July 16, 1992 ("the July 16 Hearing"), this Court indicated that,

> [h]aving imposed coercive [civil contempt] fines on [Randall Terry on] prior occasions, and having ascertained that these fines have had no effect and having concluded that there is only one course to follow with regard to Mr. Terry, I think at least as far as Randall Terry is concerned, the next step will have to be the imposition of criminal sanctions. I intend, if this matter is proved, to impose those sanctions upon him.

July 16 Hearing Transcript at 8. Terry was released on a $25,000 personal recognizance bond, secured by $250 in cash.

The United States Attorney for the Southern District of New York subsequently declined to prosecute the alleged criminal contempt and "suggest[ed] that the Court consider appointing a private attorney to prosecute the putative contumacious conduct pursuant to Rule 42(b) of the Rules of Criminal Procedure." Letter of August 3, 1992

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[2] *See* footnote 7, *infra*.

from Otto G. Obermaier, United States Attorney to Hon. Robert J. Ward. At a hearing on August 5, 1992, this Court appointed the New York State Attorney General to prosecute Terry.

Terry was arraigned and pled not guilty on August 12, 1992. His bail was continued. The instant motions followed.

II. MOTION TO RECUSE

"In deciding whether to recuse himself, the trial judge must carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning his impartiality might be seeking to avoid the adverse consequences of his presiding over the case. Litigants are entitled to an unbiased judge; not to a judge of their choosing." *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988), *cert. denied*, 490 U.S. 1102 (1989) (citation omitted); *see also United States* v. *Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992). For this reason, "[a] judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is." *In re Drexel Burnham Lambert, Inc.*, 861 F.2d at 1312.

Defendant seeks recusal pursuant to 28 U.S.C. § 144 and 28 U.S.C. §§ 455(a) & (b)(1). Recusal is required under 28 U.S.C. § 144 and 28 U.S.C. § 455(b)(1) whenever there is "personal bias or prejudice." Recusal is required under 28 U.S.C. § 455(a) whenever a judge's "impartiality might reasonably be questioned."

In support of his motion, Terry has filed a declaration claiming that "the Honorable Robert J. Ward . . . has a personal bias or prejudice against me." Declaration in Support of Motion to Recuse ¶ 2. Defendant goes on to declare that,

> [t]he facts and the reasons for the belief that such bias or prejudice exists are that the Honorable Judge, at a civil contempt hearing held on July 16, 1992,

> repeatedly expressed exasperation with me for continuing violations of the judge's injunction, even though the New York State Attorney General has yet to put forth evidence that any such violations occurred. Also, the Honorable Judge indicated at this hearing a clear predisposition of adjudging and sentencing me for criminal contempt for a period of six months, prior to any trial on the merits.

Id. ¶ 3.

The Court now turns to the standards for recusal under 28 U.S.C. § 144 and 28 U.S.C. §§ 455(a) & (b)(1) and applies these standards to the instant matter.

A. *Recusal Pursuant to 28 U.S.C. §§ 144 and 455(b)(1): For "Personal Bias or Prejudice"*

Defendant argues that the Court should recuse itself under 28 U.S.C. § 144, which provides, in relevant part,

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a *personal bias or prejudice* either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

(emphasis added).

Defendant also moves pursuant to 28 U.S.C. § 455(b)(1), which applies the same standard:

> (b) [Any justice, judge, or magistrate of the United States] shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a *personal bias or prejudice* concerning a party . . .

(emphasis added).

It is well-established that these sections, which employ the same analysis in establishing whether personal bias or prejudice exists, "look[] to *extrajudicial* conduct as the basis for making such a determination, not conduct which arises in a judicial context," *Apple* v. *Jewish Hospital and Medical Center*, 829 F.2d 326, 333 (2d Cir. 1987) (emphasis added); *see also United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966) (under § 144, "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits *on some basis other that what the judge has learned from his participation in the case.*") (emphasis added), *quoted in In re International Business Machines Corp.*, 618 F.2d 923, 927 (2d Cir. 1980).

Indeed, the Second Circuit has written that, under § 455(b)(1), "what a judge learns or comes to believe in his judicial capacity 'is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification.'" *In re Drexel Burnham Lambert, Inc.*, 861 F.2d at 1314 (quoting *United States* v. *Bernstein*, 533 F.2d 775, 785 (2d Cir.), *cert. denied*, 429 U.S. 998 (1976)).

"[T]he substantive standard for recusal under §§ 144 & 455(b)(1)] is whether a reasonable person, knowing all the facts, would conclude that the court's impartiality might reasonably be questioned." *Apple* v. *Jewish Hospital and Medical Center*, 829 F.2d at 333 (citing *United States* v. *Studley*, 783 F.2d 934, 939 (9th Cir. 1986)).

Defendant asserts that, at the July 16 Hearing, the Court exhibited personal bias or prejudice against him in two ways: (1) by "repeatedly express[ing] exasperation with defendant Randall Terry because of an alleged continued willingness to violate the mandates of this Court's [previous] injunctions," [3] and thereby "prejudg[ing]" the

[3] Defendant cites to the proceedings reported in *New York State Nat'l Org. for Women* v. *Terry*, 737 F.Supp. 1350 (S.D.N.Y. 1990),

outcome of this case, "without any evidence," Memorandum in Support at 2-3; and (2) by "express[ing] its willingness both to find . . . Terry guilty of criminal contempt and to sentence him to six months in jail." *Id.* at 4. The Court finds no merit in either of defendant's contentions, each of which relies entirely on the Court's comments at the July 16 Hearing.

In support of his first assertion, Terry points to three excerpts from the July 16 Hearing Transcript where the Court referred to defendant's action in connection with previous proceedings held before this Court in *New York State National Organization for Women* v. *Terry*.[4] On the basis of these excerpts, Terry asserts that "this Court expressed a bias and prejudice" toward him. These excerpts, including contextual statements made by the Court but not quoted by Terry, are as follows:

> (1) Randall Terry continued to express his contempt for orders of this Court. Having imposed coercive fines on those prior occasions, and having ascertained that these fines have had no effect and having concluded that there is only one course to follow with regard to Mr. Terry, I think at least as far as Randall Terry is concerned the next step will have to be imposition of criminal sanctions. [I intend, if this matter is proved, to impose those sanctions upon him.]

July 16 Hearing Transcript at 8 (brackets indicate statements made by the Court not quoted by defendant in his Memorandum in Support).

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aff'd in part and rev'd in part 961 F.2d 390 (2d Cir. 1992), *petition for cert. filed* Aug. 11, 1992.

[4] These proceedings are reported at 697 F. Supp. 1324 (S.D.N.Y. 1988), *subsequent proceeding*, 704 F. Supp. 1247 (S.D.N.Y. 1989), *aff'd in part and modified in part*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); 732 F. Supp. 388 (S.D.N.Y. 1990), *subsequent proceeding*, 737 F. Supp. 1350 (S.D.N.Y. 1990), *aff'd in part and rev'd in part*, 961 F.2d 390 (2d Cir. 1992), *petition for cert. filed*, Aug. 11, 1992.

(2) I have lost patience . . . with a defendant whom I have dealt reasonably charitably with for three years, who continues at every opportunity to comment negatively concerning the judicial process. I have before me at least one individual who has put himself above the law. . . . [This is a government of laws and not of men. It is my job to enforce the law and, if the law is broken, to penalize those who are proved to have broken the law. I don't intend to treat all of the defendants the same]. I intend [to examine each of them individually with regard to what he has done,] to determine if a coercive civil fine stands a chance. And if it does, I certainly intend to go that route. But I suggest that at least one of the defendants has crossed the Rubicon, and it is my job to maintain order on the other side of the river.

July 16 Hearing Transcript at 10 (brackets indicate statements made by the Court not quoted by defendant in his Memorandum in Support).

(3) [Counsel for defendants] ha[s] another problem. Where do you think your clients are going to be pending these elongated proceedings? Going around the country to do what I believe they have been doing and flouting the power of the Court?

July 16 Hearing Transcript at 27.

As can be seen from the expanded excerpts above, Terry does not always present the July 16 Hearing Transcript excerpts in context. For example, Terry correctly indicates that the Court said, ". . . as far as Randall Terry is concerned the next step will have to be the imposition of criminal sanctions. . . ." July 16 Hearing Transcript at 8. Defendant neglects to point out, however, that the Court continued by stating, "I intend, *if this matter is proved,* to impose those sanctions upon him." *Id.* (emphasis added).

This Court has made clear it does not intend to prejudge the defendant on the issues presented in this case. As the Court indicated at the July 16 Hearing, "I will tell you one thing: if [Randall Terry] goes to trial before me, he will be presumed innocent. I don't just accept proposed findings, I don't just accept proposed restraint." July 16 Hearing Transcript at 17.

In support of his second assertion, that the Court has already expressed a willingness to find him guilty, defendant focuses on the following comment made by this Court at the July 16 Hearing:

> Counselor, listen carefully, please. We are now over the fetus thing. They have done it. It is a fait accompli.

July 16 Hearing Transcript at 27.

Defendant's second assertion is also unconvincing. The Court's statement expresses no view as to whether Terry is guilty of violating the preliminary injunction. It merely indicates the preliminary view of the Court, based on numerous stories in the local news media, that some incident involving Governor Clinton and an alleged fetus had occurred in the vicinity of his hotel in Manhattan. But this is not a predetermination, on the part of the Court, that the preliminary injunction was violated by *Randall Terry*.

As the above Hearing Transcript excerpts make clear, this Court has, in defendant's words, "expressed exasperation" with Terry because of his "continued willingness to violate the mandates of this Court's injunctions." Memorandum in Support at 2-3. However, the fact that a court expresses disapproval for a defendant's known conduct is not enough to require recusal. As Justice Anthony Kennedy wrote when he sat on the Ninth Circuit,

> While bias or prejudice may spring from many sources, often extrajudicial in their origin, . . . negative bias or prejudice . . . will disqualify only if it is

> an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes. *It is an animus more active and deep-rooted than an attitude of disapproval toward certain persons because of their known conduct,* unless the attitude is somehow related also to a suspect or invidious motive such as racial bias or a dangerous link such as a financial interest, and only the slightest indication of the appearance or fact of bias or prejudice arising from these sources would be sufficient to disqualify.

United States v. *Conforte,* 624 F.2d 869, 881 (9th Cir.), *cert. denied,* 449 U.S. 1012 (1980) (interpreting 28 U.S.C. § 455) (emphasis added).

As the July 16 Hearing Transcript makes clear, the Court has not prejudged Terry's guilt in the matter presently before it. A thorough review of the *entire* transcript from that hearing would not lead "a reasonable person [to] . . . conclude that the court's impartiality might reasonably be questioned," *Apple* v. *Jewish Hospital and Medical Center,* 829 F.2d at 333, on the basis of personal prejudice or bias. Accordingly, recusal is not required under 28 U.S.C. § 144 or 28 U.S.C. § 455(b)(1).

B. *Recusal Pursuant to 28 U.S.C. § 455(a); Whenever a Judge's "Impartiality Might Reasonably Be Questioned"*

Defendant also asserts that this Court should recuse itself pursuant to 28 U.S.C. § 455(a), which provides:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his *impartiality might reasonably be questioned*

(emphasis added). The grounds for recusal are broader under § 455(a) than they are under §§ 144 and 455

(b)(1), *Apple* v. *Jewish Hospital and Medical Center*, 829 F.2d at 333, extending to those situations where the Court's alleged lack of impartiality creates even an "appearance of injustice," whether or not there is bias or prejudice in fact. *See In re International Business Machines Corp.*, 618 F.2d at 929; *United States* v. *Conforte*, 624 F.2d at 881; *McCann* v. *Communications Design Corp.*, 775 F. Supp. 1506, 1523 (D.Conn. 1991). A motion to recuse under § 455(a) may be made only on the basis of alleged bias or prejudice from an *extrajudicial* source, not upon trial rulings or conduct.[5] *In re International Business Machines Corp.*, 618 F.2d at 929; *Arocena* v. *United States*, 721 F.Supp. 528, 530 (S.D.N.Y. 1989) (Ward, J.), *aff'd*, 902 F.2d 1556 (2d Cir.), *cert. denied*, 496 U.S. 938 (1990).

Moreover, as the Second Circuit has noted, "[w]hen . . . a party has not alleged any grounds for recusal other than those relating to the district court's alleged bias or prejudice, those broader grounds [for recusal] are not implicated." *Apple* v. *Jewish Hospital and Medical Center*, 829 F.2d at 333 (citing *United States* v. *Sibla*, 624 F.2d 864, 867 (9th Cir. 1980)); *Arocena* v. *United States*, 721 F.Supp. at 530. Inasmuch as defendant's motion to recuse rests solely on allegations of bias or prejudice on the part of this Court, a motion under § 455(a) is not appropriate in the present case and therefore should not be granted.

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[5] The Courts of Appeals are split on the issue of whether the cause of alleged prejudice or bias under § 455(a) must stem from an extrajudicial source. The Supreme Court recently denied certiorari on a case that would have allowed a resolution of this split. In addition to the Second Circuit, the Fourth, Fifth, Sixth, Ninth and Eleventh Circuits all hold that the appearance of judicial bias or prejudice under § 455(a) must come from an extrajudicial source. *See Waller* v. *United States*, 112 S.Ct. 2321, 2322 (1992) (White, J., dissenting). When undertaking a § 455(a) analysis, only the First Circuit considers the appearance of prejudice or bias originating in judicial proceedings. *Id.* (citing *United States* v. *Chantal*, 902 F.2d 1018, 1022 (1st Cir. 1990)).

Furthermore, even if a § 455(a) motion were appropriate, it must be denied on the merits. The standard under § 455(a) is "whether a reasonable person, knowing and understanding all the relevant facts, would conclude that the judge's impartiality might reasonably be questioned." *McCann* v. *Communications Design Corp.*, 755 F.Supp. at 1523; *see United States* v. *Lovaglia*, 954 F.2d at 815; *In re Drexel Burnham Lambert, Inc.*, 861 F.2d at 1313.

For the reasons stated in the previous section of this Opinion, concerning that part of the motion seeking recusal pursuant to §§ 144 and 455(b)(1), the Court finds no basis for holding that a reasonable person, knowing and understanding all the relevant facts would conclude that this Court's impartiality in the instant matter might reasonably be questioned. There is no appearance of injustice in the present matter. For this reason, recusal is not required pursuant to 28 U.S.C. § 455(a).

III. MOTION TO PRESENT CONSTITUTIONAL ARGUMENTS

Defendant contends that the portion of the Preliminary Injunction which enjoins him from "presenting or confronting . . . Governor Bill Clinton . . . with any fetus or fetuses or fetal remains in the City of New York" is unconstitutional because it prohibits him from exercising his First Amendment rights. Terry now moves for leave to present this constitutional argument collaterally as a defense at his criminal contempt proceeding.

It is well-established that,

> a party subject to a court order must abide by its terms or face criminal contempt. Even if the order is later declared improper or unconstitutional, it must be followed until vacated or modified. . . . A party may not violate an order and raise the issue of its unconstitutionality collaterally as a defense in the criminal contempt proceeding. Rather, the ap-

> propriate method to challenge a court order is to petition to have the order vacated or amended.

In re Providence Journal Co., 820 F.2d 1342, 1346 (1st Cir. 1986), *modified on reh'g en banc*, 820 F.2d 1354 (1st Cir. 1987), *cert. dismissed sub nom. United States* v. *Providence Journal Co.*, 485 U.S. 693 (1988) (citing *Walker* v. *Birmingham*, 388 U.S. 307 (1967); *United States* v. *United Mine Workers*, 330 U.S. 258 (1947)); *see also F.T.C.* v. *American Nat'l Cellular*, 868 F.2d 315, 317 (9th Cir. 1989). This is known as the collateral bar rule.[6]

This general rule does have an exception when the underlying order is "transparently invalid." *Walker* v. *Birmingham*, 388 U.S. at 315; *In re Providence Journal Co.*, 820 F.2d at 1347. An order is transparently invalid when the issuing court

> is acting so far in excess of its authority that it has no right to expect compliance and no interest is protected by requiring compliance.
>
> The line between a transparently invalid order and one that is merely invalid is, of course, not always distinct. As a general rule, if the court reviewing the order finds the order to have had any pretence [sic] to validity at the time it was issued, the reviewing court should enforce the collateral bar rule.

In re Providence Journal Co., 820 F.2d at 1347.

Although reasonable minds may disagree as to whether all or part of the Preliminary Injunction is unconstitutional, the Court cannot say, upon reflection, that its order had no pretense to validity at the time of issuance or that the Court "act[ed] so far in excess of its authority that

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[6] This Court has neither found, nor been directed to, any Second Circuit case law on the issues raised in this motion. For this reason, the Court treats these issues as matters of first impression in this circuit, with appropriate guidance from the Supreme Court and other circuits.

it has no right to expect compliance." *Id.* In contrast to the situation in *Providence Journal,* the instant matter is not a case of a court imposing a prior restraint on *pure* speech, a judicial act which would be transparently invalid. *In re Providence Journal Co.,* 820 F.2d at 1348, 1353. The alleged presentation or confrontation at issue in this case involves a classic example of speech intertwined with conduct. An injunction against speech in the form of conduct is not transparently invalid, because such an injunction may embrace constitutionally legitimate state concerns. *See Walker* v. *Birmingham,* 338 U.S. at 315-16; *In re Providence Journal Company,* 820 F.2d at 1348. For this reason, the Court finds that the Preliminary Injunction is not transparently invalid. Accordingly, the collateral bar rule should apply in the instant matter.

Furthermore, the *Providence Journal* court, sitting en banc, announced in dictum that, even when a party believes a court order to be transparently invalid, the party must demonstrate that it has made a "good faith effort to seek emergency relief from the appellate court" in order to avoid application of the collateral bar rule. *In re Providence Journal Co.,* 820 F.2d 1354, 1355 (1st Cir. 1987) (en banc), *cert. dismissed sub nom. United States* v. *Providence Jounral Co.,* 485 U.S. 693 (1988). This Court adopts the dictum of the First Circuit, and holds that, even if Terry believed all or part of the Preliminary Injunction to be transparently invalid, he was obligated to make a good faith effort to seek emergency relief from the Second Circuit before violating the injunction.

In the instant case, Terry, despite advice and detailed instructions from the Court in this regard,[7] made no such

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[7] The extent of the Court's advice and instructions can be seen in the following colloquy from the July 13 Hearing:

> Mr. Mylott: Without waiving any right to appeal this issue and present my total opposition to the whole issue, and not to

effort to directly appeal the constitutionality of the Preliminary Injunction. Therefore, even if all or part of the Preliminary Injunction were "transparently invalid," he cannot avail himself of this exception to the collateral bar rule.

In further support of this motion, Terry points to a separate provision of the Preliminary Injunction which provides that, "nothing in the Court's Order should be construed to limit defendants and those acting in concert with them from exercising their legitimate First Amendment rights." Preliminary Injunction at 5 ("the First Amendment Provision"). He asserts that, because this provision was included in the Preliminary Injunction, con-

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drag out this proceeding any farther, I will for this purpose consent to your "presenting and confronting" language.

The Court: On that subject, I checked and ascertained that the United States Court of Appeals for the Second Circuit is sitting this week on the 17th floor.

Mr. Mylott: Thank you very much, your Honor.

The Court: They don't sit every week during the months of July and August, but I checked to be certain that you would have some place to go if you felt unduly restricted or unlawfully restrained by what I was going to do.

. . . .

The Court: . . . I think it appropriate, Mr. Mylott, that you make an application for a stay which I would then be disposed to deny which would then permit you if you wish to take the matter to the Second Circuit.

. . . .

The Court: The application for a stay of the new paragraph 7 is denied. I would note that the document counsel has now constitutes a preliminary injunction which is appealable as of right to the United States Court of Appeals for this circuit.

As I noted earlier, it is my understanding that the Court of Appeals is in session this week. I believe the usual motion day of the court is Tuesday which, of course, is tomorrow.

In any event, despite the fact that it is the 13th of July, there are appellate judges available to consider any emergency application.

July 13, 1992 Hearing Transcript at 53, 55, 56.

sideration of his First Amendment arguments is necessary, by definition, in order to determine the scope of the injunction and to determine whether defendant's alleged activity violates that injunction.

The Preliminary Injunction's prohibition against "presenting or confronting . . . Governor Bill Clinton . . . with any fetus or fetuses or fetal remains in the City of New York" ("the Restraint on Presentation Provision") was the subject of considerable discussion at the July 13 Hearing, and if counsel for Terry had any doubt as to this prohibition's meaning or scope, he had ample opportunity to raise questions and seek clarification at that proceeding. Indeed, the language first proposed by the Court at the July 13 Hearing was more limited: it would have enjoined defendant from "[*c*]*onfronting* . . . Governor Bill Clinton . . . ." July 13 Hearing Transcript at 48. The Court then engaged in the following discussion with Terry's counsel:

> Mr. Mylott: With respect to adding this new paragraph, I do not see the need for it, your Honor, and I have trouble with the word "confronting." I do not know what that means. . . . So I think that using the word "confronting" is vague your Honor. I would oppose that. I oppose the entire paragraph as totally unnecessary.
>
> The Court: Would you prefer the words "presenting or confronting"? In other words that pretty much covers the waterfront, presenting or confronting either with any, certainly.
>
> . . . .
>
> Mr. Mylott: Without waiving any right to appeal this issue and present my total opposition to the whole issue, and not to drag out this proceeding any farther, I will for this purpose consent to your "presenting and confronting" language.

Id. at 52-53. On the basis of this dialogue, the Court modified its proposed language for the preliminary in-

junction by adding a prohibition on "presenting." Terry's counsel did not indicate any perceived ambiguity or vagueness in that word choice. Furthermore, even if a party believes an injunction to be unconstitutionally vague, "the way to raise that question [is] to apply to the . . . courts to have the injunction modified or dissolved," not to raise that point collaterally in a contempt proceeding. *Walker* v. *Birmingham,* 388 U.S. at 317.

There is no indication from the July 13 Hearing that the Court found the Restraint on Presentation Provision to be negated by, or inconsistent with, the First Amendment Provision. If counsel for Terry had believed these two provisions to be inconsistent or that the latter negated the former, this assertion should have been raised either at the July 13 Hearing or in an appeal to the Second Circuit prior to the alleged incident with Governor Clinton. Neither course of action was taken.

This Court finds that Terry is alleged to have violated a clear and unambiguous provision of the preliminary injunction, namely a prohibition on "presenting or confronting . . . Governor Bill Clinton . . . with any fetus or fetuses or fetal remains in the City of New York." This prohibition on speech involving conduct was not "transparently invalid" nor did the Court indicate that it was inconsistent with, or negated by, the First Amendment Provision. The time to present arguments based upon the constitutionality or internal consistency of all or part of the Preliminary Injunction was at the time of its issuance or on appeal of the Preliminary Injunction *prior* to violating its terms. Accordingly, the motion to present constitutional arguments is denied.

CONCLUSION

For the reasons stated herein, defendant's motions to recuse, pursuant to 28 U.S.C. §§ 144 and 455(a) & (b)(1), and to present arguments that the Preliminary Injunction was in violation of the First Amendment are denied.

It is so ordered.

Dated: New York, New York
October 6, 1992

/s/ Robert J. Ward
U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Cr. Misc. #1 Pg. 46 (RJW)

UNITED STATES OF AMERICA

-against-

RANDALL TERRY,

Defendant.

OPINION

WARD, District Judge.

Defendant Randall Terry served and filed nine separate motions in connection with his forthcoming criminal contempt trial before this Court. At oral argument on September 24, 1992 and in a subsequent opinion, *United States* v. *Randall Terry*, 92 Cr. Misc. #1 Pg. 46 (RJW), 1992 WL 275265 (S.D.N.Y. Oct. 6, 1992) ("the October 6 Opinion"), this Court disposed of eight of these motions and deferred decision on one motion, the Motion to Disqualify the [New York State] Attorney General from Appointment as Prosecutor ("the Motion to Disqualify"), pending further submissions to the Court and, if necessary, an evidentiary hearing. The Attorney General of the State of New York ("the Attorney General") opposes the Motion to Disqualify. For the reasons hereinafter stated, the Motion to Disqualify is denied.

BACKGROUND

The underlying facts and general procedural history of this action are described in the October 6 Opinion and the Court assumes familiarity with that decision.

At a contempt hearing held on July 16, 1992 ("the July 16 Hearing"), the Court noted that it had previously imposed coercive civil contempt fines on Terry in a related civil matter, 88 Civ. 3071 (RJW), and that "these fines have had no effect." July 16 Hearing Transcript at 8. For this reason, the Court, *sua sponte*, indicated that, if it was proved that Terry violated this Court's preliminary injunction issued July 13, 1992 ("the July 13 Preliminary Injunction"), the imposition of criminal sanctions, rather than civil sanctions, would be appropriate.

Pursuant to the instructions of the Supreme Court in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801-02 (1987), this Court referred the matter to the United States Attorney for the Southern District of New York. The United States Attorney subsequently declined to prosecute the alleged criminal contempt and "suggest[ed] that the Court consider appointing a private attorney to prosecute the putative contumacious conduct pursuant to Rule 42(b) of the Rules of Criminal Procedure." Letter of August 3, 1992 from Otto G. Obermaier, United States Attorney to Hon. Robert J. Ward.

At a hearing on August 5, 1992, this Court, on its own initiative, inquired whether the Attorney General would be agreeable to appointment to prosecute the alleged criminal contempt by Terry. The Attorney General responded in the affirmative, whereupon the Court appointed the Attorney General to prosecute this matter. *See Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. at 793-801 ("[I]t is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which neces-

sarily encompasses the ability to appoint a private attorney to prosecute the contempt." *Id.* at 793.).

At the same hearing, the initial charge of civil contempt against Terry, which had been brought on by an order to show cause signed by this Court on July 15, 1992, was dismissed. Transcript of Proceedings of August 5, 1992 at 5. The order to show cause why the eight remaining defendants [1] should not, *inter alia*, be held in civil contempt of the July 13 Preliminary Injunction ("the civil contempt proceeding") is still pending.

Following appointment of the Attorney General to prosecute the criminal contempt, plaintiff filed the instant Motion to Disqualify. In support of his motion, Terry filed a declaration stating, in relevant part:

> 2. I did attend a pro-abortion rally held on the Mall in Washington, D.C., on April 5, 1992, for the purpose of expressing the opposing pro-life viewpoint.
>
> 3. The Attorney General of the State of New York, Robert Abrams, also attended that rally. When he saw me he walked over to me and began loudly chanting, "you are going to lose." He then emphasized his enmity toward me by lodging his thumbs in his ears, wriggling his fingers, and sticking out his tongue.

Declaration in Support of Motion to Disqualify ¶¶ 2-3 ("The Terry declaration").

At the September 24 oral argument on the Motion to Disqualify, the Attorney General took the position that the alleged events described in the Terry declaration were "irrelevant," arguing that "[w]hat has been described in Mr. Terry's papers is an innocuous passing of two men at a rally in Washington and it has no bearing on this matter

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[1] At present, these defendants are Keith Tucci, Patrick Mahoney, Joseph Foreman, Operation Rescue National, Missionaries to the Pre-Born, Youth for America, Robert L. Schenck and Harley Belew.

whether the Attorney General in fact can maintain the appropriate impartiality in pursuing the responsibilities that this Court has appointed him to fulfill." September 24 Hearing Transcript at 21-22.

The Court then expressed its view that the alleged incident described in the Terry declaration was, indeed, relevant to defendant's motion, *id.* at 22, and invited the parties to file any additional affidavits and supplemental submissions on the law.

On September 29, 1992, Robert Abrams, Attorney General of the State of New York, filed an affidavit describing the events at the rally on April 5, 1992 and asserting, *inter alia,* that "[a]t no time did I engage in any of the activities alleged in paragraph 3 of the Affidavit of Randall Terry, dated August 20, 1992. His allegations are patently false and ridiculous." Affidavit of Robert Abrams in Opposition to Motion to Disqualify ¶ 10. In addition, Diane Schulder Abrams, the wife of Robert Abrams, filed an affidavit describing her participation in the April 5, 1992 rally and stating, *inter alia,* that "[a]t no time did I see my husband engage in any of the activities alleged in paragraph 3 of the Affidavit of Randall Terry, dated August 20, 1992." Affidavit of Diane Schudler Abrams in Opposition to Motion to Disqualify ¶ 7.

Terry subsequently filed a declaration by Jeff White in which the declarant claimed:

> 2. I was present with Randall Terry at a pro-abortion rally held on the Mall in Washington, D.C., on April 5, 1992.
>
> 3. At a certain point during that demonstration I saw a bald-headed man in a suit approach Mr. Terry and loudly chant, "you are going to lose." The man then lodged his fingers in his ears and stuck out his tongue at Mr. Terry.
>
> 4. Although at the time I did not know who this individual was, I have subsequently come to learn

through seeing a photograph that the man who stuck his tongue out at Mr. Terry is Robert Abrams, the Attorney General of the State of New York.

Because (1) the affidavits in opposition directly contradict the declarations in support and (2) the declarations in support, if true, suggest that the Attorney General *may* harbor personal animosity against Terry, this Court held an evidentiary hearing on November 18, 1992 in order to make factual findings concerning the events of April 5, 1992, and, as a corollary, to evaluate defendant's claim that Abrams harbors a personal animosity toward him.

DISCUSSION

It is uncontested by the parties that a federal court may not appoint an interested party to prosecute a charge of criminal contempt.[2] The disputed question presently before this Court is whether the Attorney General of the State of New York should be categorized as an "interested party," thereby requiring his disqualification in the instant matter. Defendant answers this question in the affirmative for three reasons:

(1) "the Attorney General is involved in the concurrent civil litigation pending before this Court";

(2) "the Attorney General stands to gain financially if the People prevail on the 42 U.S.C. § 1985 (3) causes of action in the civil litigation"; and

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[2] Indeed, this prohibition is codified for United States attorneys and their staffs with respect to all investigations and prosecutions:

> The Attorney General [of the United States] shall promulgate rules and regulations which require the disqualification of any . . . United States attorney or a member of such attorney's staff[] from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof.

28 U.S.C. § 528.

(3) "Robert Abrams fosters personal animosity for Randall Terry which he has expressed publicly".

Memorandum in Support at 1-2.

The first two arguments for disqualification put forward by defendant may be classified as relational, because these arguments are based on the position the Attorney General occupies in relation to the underlying civil litigation and the concurrent civil contempt proceeding. These claims fall squarely within the framework of analysis established by *Vuitton* and its progeny. Terry's third claim, however, is fundamentally distinct, in that it asserts that Abrams harbors a personal prejudice against Terry, thereby requiring the disqualification of Abrams as an individual, and, by extension, the office he heads.[3] Under his third claim, Terry asserts that, even if the Attorney General had no involvement with the related civil litigation, he should still be disqualified.

A. *Disqualification Because of the Attorney General's Involvement in the Related Civil Litigation*

The central case concerning the appointment of an allegedly "interested" party to bring a criminal contempt prosecution when that party is involved in related civil litigation is *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), in which the Supreme Court held that counsel for a party that is the beneficiary of a federal court order may not be appointed by a federal court to bring a charge of criminal contempt for an alleged violation of the underlying court order. The *Vuitton*

[3] In order to avoid confusion when discussing Terry's logically distinct arguments for disqualification, the term "Attorney General" is used throughout this opinion in an institutional sense and refers to the *office* of the Attorney General of the State of New York, including revelant staff members in that office. When discussing the alleged personal prejudices of the prosecutor in this matter, the Court refers to the Attorney General by his name, "Robert Abrams" or "Abrams", rather than his title.

court's authority to make this determination derived from its general supervisory power over federal prosecutions in federal courts, and was not based on constitutional due process considerations. *See Sassower* v. *Sheriff of Westchester County*, 824 F.2d 184, 191 (2d Cir. 1987) (noting that only Justice Blackmun believed that the practice of appointing an interested party as counsel to prosecute for criminal contempt is a violation of due process).

In the instant matter, the Attorney General has participated in: (1) the underlying civil litigation, wherein the Attorney General sought and obtained the July 13 Preliminary Injunction; and (2) the pending civil contempt proceedings, in which it is alleged that other individuals and organizations violated the July 13 Preliminary Injunction. A careful review of the Supreme Court's reasoning in *Vuitton* leads to the conclusion that neither *civil* proceeding compels the Attorney General's disqualification from Terry's *criminal* contempt proceedings.

The United States Attorney is pursuing public, not private, interests when he appears in Court. As the *Vuitton* court explained,

> "[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer."

Young v. *United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. at 803 (quoting *Berger* v. *United States*, 295 U.S. 78, 88 (1935)).

Rather than representing the interests of a private party, the Attorney General acts *parens patriae*, asserting a "quasi sovereign" interest for the common good of the people of the State of New York. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 600-08 (1982); *People by Abrams* v. *11 Cornwell Co.*, 695 F.2d 34, 38-40 (2d Cir. 1982), *vacated in part on other grounds*, 718 F.2d 22 (2d Cir. 1983) (en banc). Accordingly, the Attorney General occupies a position similar to that of the United States Attorney and is entitled to the same presumption of impartiality as a "servant of the law."

Nevertheless, a sovereignty, including the United States government, might still face a conflict of interest in a prosecution for criminal contempt, when, for example,

> [vigorous advocacy in a related civil context] may cloud the [government] attorneys' ability to distinguish between contempt prosecutions that further their purported primary objective—compliance with the court's order—and those that are driven by a primary motive to further the goals of the underlying litigation. For example, government attorneys may be tempted to pursue a nonmeritorious contempt prosecution because the prosecution would allow them to obtain documents or access to information useful in the underlying civil litigation. They may also be tempted to abandon, press or compromise a prosecution wholly apart from its merits to leverage settlement in the underlying litigation. If their perspective is colored by involvement with the underlying civil action, then they more closely resemble the "interested parties" in *Vuitton* than impartial U.S. Attorneys.

F.T.C. v. *American Nat'l Cellular*, 868 F.2d 315, 319 (9th Cir. 1989).

Furthermore, disqualification is required when there is even the appearance of a conflict. *See Young* v. *United*

States ex rel. Vuitton et Fils S.A., 481 U.S. at 806 ("as will generally be the case, the appointment of counsel for an interested party to bring the contempt prosecution in this case at a minimum created *opportunities* for conflicts to arise, and created at least the *appearance* of impropriety." (emphasis in original)).

Finally, the Attorney General will receive no financial benefit, for either his office or the State of New York, from the criminal contempt proceedings. This Court has already indicated that any fines imposed in this criminal proceeding would be deposited into the federal treasury and not paid to the State of New York. Furthermore, this Court has previously announced that it does not intend to award any attorneys' fees to the Attorney General for prosecution of the alleged criminal contempt. Transcript of Proceedings of August 5, 1992 at 12.

The Court now turns to each of the two related civil proceedings, in order to determine whether either creates an actual or apparent conflict of interest for the Attorney General which would require his disqualification from the criminal prosecution of Terry.

1. *The Underlying Civil Litigation*

On July 13, 1992, the Attorney General obtained a preliminary injunction enjoining Terry, among others, from engaging in certain activities. At the present time, the Court is aware of no activity on the part of the Attorney General with respect to the July 13 Preliminary Injunction which would create a conflict of interest. The Attorney General is not currently seeking a modification of the July 13 Preliminary Injunction or its conversion into a permanent injunction. In *United States ex rel. SEC* v. *Carter*, 907 F.2d 484 (5th Cir. 1990), the court held that the Securities and Exchange Commission ("the SEC") could not be appointed as a special prosecutor in a contempt action while the SEC was "locked in an on-going civil struggle" with the alleged contemnor. *Id.* at 486.

The *Carter* court noted that "a pending civil action in which the special prosecutor had an interest 'theoretically could have created temptation to use the criminal investigation to gather information of use in those suits, and could have served as bargaining leverage in obtaining pleas in the criminal prosecution.'" *Id.* (quoting *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. at 806).

Because the Attorney General is not actively pursuing any claims in connection with the underlying civil litigation, there is not even the appearance that the prosecution for criminal contempt might be used for leverage in the underlying civil litigation or vice versa. This is in marked contrast to the fact patterns in *Vuitton* and *Carter*, where civil claims were pending in the underlying litigation at the time of the criminal contempt investigations and prosecutions.

In addition, as the Attorney General notes, he "cannot derive from this criminal proceeding any practical advantage in the underlying civil action," Memorandum in Opposition at 14, because there has been no grand jury convened to elicit evidence and because the Attorney General has at least as much ability to collect evidence in the civil litigation under Rules 26, 30, 33, 34 and 45, Fed. R. Civ. P., as he does in the criminal prosecution pursuant to Rule 17, Fed. R. Cr. P.

Furthermore, while the Attorney General has sought to be reimbursed for the attorneys' fees and costs associated with the underlying preliminary injunction, Amended Complaint at 25, any recovery would go directly into the general coffers of the State of New York. The Attorney General has represented that he would reap no direct institutional gain from this recovery of expenses. September 24, 1992 Oral Argument Tr. at 28. The only financial interest the Attorney General conceivably might have in the underlying civil litigation is in increased general state revenues. This interest is simply too remote to require

disqualification. *See Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 250-52 (1980). Finally, the Attorney General has not sought any damages in the underlying civil action.

In conclusion, on the facts of this case, the Attorney General's involvement in the underlying civil litigation does not create a conflict of interest, real or potential.

2. *The Concurrent Civil Contempt Proceedings*

In the instant matter, the civil contempt proceedings also present no conflict of interest, real or potential, for the Attorney General. As an initial matter, the purposes of civil and criminal contempt proceedings, while different, are convergent. A civil contempt proceeding is remedial and intended to coerce the contemnor, while a criminal contempt proceeding is designed to vindicate the authority of the court. 3 Charles A. Wright, *Federal Practice and Procedure* § 704 (1982). Nevertheless, criminal contempt has the same incidental effects as civil contempt and *vice versa*:

> In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it also is seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order.

Hicks ex rel. Feiock v. *Feiock*, 485 U.S. 624, 635 (1988); *see Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 443 (1911). Therefore, the *Vuitton* court's concern that the prosecutor in a criminal contempt proceeding not be placed in a position where he must "serve two masters" *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. at 814, is simply not an issue when the source of conflict is the prosecution of both civil and criminal contempt.

Furthermore, as indicated above, all charges of civil contempt against Terry have been dismissed and Terry's counsel does not represent any of the defendants in the civil contempt proceedings. Accordingly, there is no opportunity for the Attorney General to use this criminal contempt prosecution to pressure Terry to settle any civil contempt proceeding.

The Attorney General will reap no financial gain, for either himself or the State of New York, from the civil contempt proceedings. This Court has already indicated that any fines imposed in the civil contempt proceedings would be made payable to the United States and not the State of New York. In addition, consistent with its oral decision rendered July 24, 1992 and judgment dated August 5, 1992 in *People of the State of New York* v. *Operation Rescue National,* 92 Civ. 4884 (RJW), this Court does not intend to award attorneys' fees in the civil contempt proceedings, even if the Attorney General prevails in those proceedings. Because the Attorney General has no financial interest in the outcome of either the civil or criminal contempt proceedings, there is no reason to disqualify him on this ground.

Finally, as with the underlying civil action, the Attorney General is not in a position to acquire evidence under the Federal Rules of Criminal Procedure that cannot presently be acquired pursuant to the Federal Rules of Civil Procedure.

For these reasons, the Court finds that the Attorney General's involvement in the concurrent civil litigation pending before this Court does not make the Attorney General an "interested party" under the standards of *Vuitton* and its progeny. Accordingly, disqualification is not required as a result of this involvement.

B. *Robert Abrams' Alleged Personal Animosity Toward Randall Terry*

Terry asserts Abrams' alleged gestures on April 5, 1992 indicate overt hostility toward Terry and require the disqualification of the Attorney General. In their submissions to the Court, the parties do not provide any case law concerning the standards to be used in determining whether a publicly-expressed "statement" of the sort attributed to Abrams requires disqualification of a prosecutor.

While a prosecutor must harbor no *personal* animosity, he need not be disinterested on the question of whether a defendant is guilty. As the Second Circuit has written:

> The concept [of a "disinterested" prosecutor] is not altogether easy to define. Of course, a prosecutor need not be disinterested on the issue whether a prospective defendant has committed the crime with which he is charged. If honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means. True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury—not the prosecutor. Is is a bit easier to say what a disinterested prosecutor is not than what he is. He is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in bringing a defendant to justice with respect to the crime with which he is charged.

Wright v. *United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) (citation omitted), *cert. denied*, 469 U.S. 1106 (1985).

Terry's allegations concerning Abrams' gestures on April 5, 1992, if true, suggest that Abrams *may* have a personal "axe to grind" against Terry. For this reason, the Court

conducted an evidentiary hearing on November 18, 1992, at which Randall Terry, Jeff White, Diane Schulder Abrams and Robert Abrams testified. Each of these individuals provided testimony consistent with his or her affidavit or declaration. On the basis of this testimony, the Court finds that (a) neither the prosecutor nor the defendant has established that his version of the events of April 5, 1992 is true and (b) even if the Court accepts Terry's and White's version of the facts as true, the gesture and comment made by Abrams toward the defendant was of no more than five seconds duration and does not demonstrate that Abrams harbors a personal animosity toward Terry.

Defendant also asserts that Abrams' personal animosity is evidenced by a television commercial Abrams ran repeatedly during his primary campaign to become the Democratic nominee for a United States Senate seat from New York.[4] As a voice-over says, "[w]hile Abrams stood up to the anti-abortion extremists, Ferraro was silent," the viewer sees an unidentified newspaper headline which reads, "Abrams to prosecute Operation Rescue chief." On the basis of this commercial, defendant argues that, "[n]ot only does the Attorney General harbor a deep seated enmity toward Randall Terry, the Attorney General also seeks to parlay any prosecution of Randall Terry into political gain." Defendant's Reply Memorandum at 5.

This television commercial demonstrates no personal animosity on the part of Abrams. The newspaper headline simply states a fact in objective terms and indicates no prejudice. While the use of the classification "anti-abortion extremists" makes clear Abrams' view of the activities of Terry and his colleagues, such a word choice appears to represent a professional opinion by Abrams concerning the general tactics used by Terry and others

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[4] While Abrams did win the Democratic nomination, he did not win the 1992 general election.

affiliated with Operation Rescue. It simply does not rise to the level of a *personal* "axe to grind."

Finally, the undisputed fact that Abrams sought to obtain political gain from his prosecution of Terry is not enough to disqualify him. There is no evidence that potential political gain was the motivating force behind the Attorney General's decision to prosecute, rather than a by-product of his participation in the prosecution.[5] Indeed, it was this Court, not the Attorney General, which: (1) indicated that criminal, not civil, contempt was appropriate with respect to Terry and (2) in light of the United States Attorney's decision not to prosecute, asked the Attorney General to prosecute the criminal contempt. If, as is the case here, a prosecutor believes that a charged defendant has violated the law, it does not demonstrate personal prejudice for that prosecutor to inform the voters of his efforts to "bring[that] defendant to justice with respect to the crime with which he is charged." *Wright* v. *United States*, 732 F.2d at 1056.

In summary, Terry has failed to demonstrate personal animosity on the part of Abrams. Accordingly, the Attorney General should not be disqualified on this ground.

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[5] At the November 18 evidentiary hearing, defendant also relied on several newspaper articles, published during the Senate campaign, containing quotes from Abrams concerning his involvement in this prosecution. As with the television commercial, these quotes do not demonstrate personal animosity. In this Court's view, they merely seek to explain to the public Abrams' record as Attorney General.

CONCLUSION

For the reasons stated above, the Court finds that the Attorney General is not an interested party under the standards set forth in *Vuitton*. In addition, Randall Terry has failed to prove that Robert Abrams harbors a personal animosity against him. Therefore, defendant's motion to disqualify is denied.

It is so ordered.

Dated: New York, New York
November 20, 1992

/s/ Robert J. Ward
U.S.D.J.

APPENDIX E

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 92 Cr. Misc. # 1 Pg. 46 (RJW)

UNITED STATES OF AMERICA

v.

RANDALL TERRY

March 10, 1993

ROBERT J. WARD, District Judge.

At the conclusion of a hearing held on July 13, 1992 ("the July 13 Hearing"), this Court issued a preliminary injunction in *People of the State of New York v. Operation Rescue National,* 92 Civ. 4884 (RJW) ("the Preliminary Injunction"). Randall Terry, one of the named defendants in that civil action, is now charged with two counts of criminal contempt for violating two provisions of the Preliminary Injunction. Following a non-jury trial and upon careful consideration of the trial record, including arguments made in the post-trial briefs and in the summations, the Court makes a general finding of guilty with respect to Count One of the Notice of Charge and not guilty with respect to Count Two of the Notice of Charge. In reaching its verdict, the Court makes the following special findings of fact pursuant to Rule 23(c), Fed.R.Crim.P.

A. *Procedural History*

The Preliminary Injunction enjoined the defendants in the underlying civil action, including Terry, and all others acting in their behalf or in concert with them, from, *inter alia,*

> presenting or confronting either Governor Bill Clinton or Senator Albert Gore with any fetus or fetuses

> or fetal remains in the City of New York or elsewhere in the Southern District of New York between [12:45 P.M. on July 13, 1992] and 12:00 midnight on July 17, 1992. . . .

Preliminary Injunction, Second Decretal Paragraph, Clause (7) ("Clause (7)").

In addition, the Fourth Decretal Paragraph of the Preliminary Injunction provided:

> IT IS FURTHER ORDERED that defendant organizations and their officers and agents, and all individual defendants and those acting in concert with them, shall make good faith efforts to instruct all organizations and individuals they believe to be planning to participate in any of the activities enumerated in clauses (1) through (7) of the second decretal paragraph above not to engage in the proscribed activities. . . .

In Count One of the Notice of Charge, the government [1] alleges that, in violation of the Preliminary Injunction and 18 U.S.C. §§ 2 [2] and 401(3),[3] Terry "aided,

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[1] This matter is being prosecuted by the New York State Attorney General. *See United States v. Terry*, 806 F.Supp. 490 (S.D.N.Y. 1992).

[2] 18 U.S.C. § 2 provides,

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

[3] 18 U.S.C. § 401 provides, in relevant part,

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> . . . .
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

abetted, counseled, commanded, induced, procured or caused" Harley David Belew to present or confront Governor Bill Clinton with a fetus or fetal remains on July 14, 1992 in the Southern District of New York. Notice of Charge ¶¶ 2-3.

In Count Two of the Notice of Charge, the government alleges that, in violation of the Preliminary Injunction and 18 U.S.C. § 401(3), Terry "had knowledge that Harley [David] Belew was planning to present or confront Governor Bill Clinton with a fetus, fetuses or fetal remains in the City of New York on or before July 17, 1992 and did not make good faith efforts to instruct Mr. Belew not to engage in that activity." Notice of Charge ¶¶ 6-7.

Following trial on November 19 and 20, 1992, the parties filed post-trial briefs with the Court and summations were heard on March 5, 1993.

B. *Elements of the Crime*

This Court may find Terry guilty of criminal contempt only if the government has proven beyond a reasonable doubt that Terry willfully violated the specific and definite terms of the Preliminary Injunction. *See United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 659 (2d Cir.1989), *cert. denied*, 493 U.S. 1021, 110 S.Ct. 722, 107 L.Ed.2d 741 (1990).

1. Terms of the Injunction

The Court finds that the terms of the Preliminary Injunction were specific and definite as to the time, place and type of conduct enjoined, as well as to who was enjoined from engaging in—or enjoined to engage in—such conduct.[4] *See United States v. Terry*, 802 F.Supp. 1094,

[4] On January 13, 1993, six months after this Court issued the Preliminary Injunction, the United States Supreme Court decided *Bray v. Alexandria Women's Health Clinic*, —— U.S. ——, 113

1103 (S.D.N.Y.1992) ("This Court finds that Terry is alleged to have violated a clear and unambiguous provision of the preliminary injunction, namely a prohibition on 'presenting or confronting . . . Governor Bill Clinton . . . with any fetus or fetuses or fetal remains in the City of New York.' ").

2. Notice

Defendant had notice of the Preliminary Injunction. He was represented by counsel, Raymond L. Mylott, at the July 13 Hearing. July 13. Tr. at 3. At the conclusion of the July 13 Hearing, Clause (7) was read into the record in the presence of Mr. Mylott, who also received a copy of the Preliminary Injunction. *Id.* at 54-55. Moreover, as

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S.Ct. 753, 122 L.Ed.2d 34 (1993), holding that the first clause of 42 U.S.C. § 1985(3) does not provide a federal cause of action against persons obstructing access to abortion clinics. The *Bray* court indicated, however,

> [Petitioners] contend that respondents' § 1985(3) claims were so insubstantial that the District Court lacked subject-matter jurisdiction over the action, including the pendant state claims; and that the injunction should therefore be vacated and the entire action dismissed. We do not agree. While respondents' § 1985(3) causes of action fail, they were not, prior to our deciding of this case, "wholly insubstantial and frivolous," so as to deprive the District Court of jurisdiction.

Id. —— U.S. at ——, 113 S.Ct. at 768 (quoting *Bell v. Hood*, 327 U.S. 678, 682-83, 66 S.Ct. 773, 776, 90 L.Ed 939 (1946)). Inasmuch as the Preliminary Injunction was issued *prior* to the *Bray* decision, and was not, therefore, based on claims that were, at the time, "wholly insubstantial and frivolous," this Court is not divested of subject-matter jurisdiction.

Furthermore, as the government notes, the plaintiff in *People of the State of New York v. Operation Rescue National*, 92 Civ. 4884 (RJW) sought relief under the second clause of § 1985(3) (the "preventing or hindering" clause), whereas the *Bray* court only expressly decided the applicability of the first clause of § 1985(3) (the "depriving" clause). This provides an independent basis for this Court's conclusion that plaintiff's claims in the underlying civil action were not so "wholly insubstantial and frivolous" as to divest this Court of subject-matter jurisdiction.

this Court has already instructed Terry, in a related civil matter, "[p]arties are charged with a duty to monitor the progress of their cases and to ascertain the terms of any order entered against them." *New York State NOW v. Terry*, 697 F.Supp. 1324, 1332 n. 9 (S.D.N.Y.1988) (citing *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 109 (2d Cir.1987); *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 808-09 (2d Cir. 1981)), *aff'd in part and modified in part*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990).

Defendant argues that the Preliminary Injunction was issued in a "disordered and illegible condition." The Court disagrees. A review of Government Ex. 10, a copy of the Preliminary Injunction, indicates that the handwriting is legible, including the provision enjoining defendant from "presenting or confronting" Governor Clinton or Senator Gore with a "fetus, fetuses or fetal remains." Furthermore, as already noted, this provision was read into the record at the conclusion of the July 13 Hearing, in the presence of Terry's attorney.

Finally, the parties stipulated to the admission of Patrick Mahoney's deposition testimony in the civil action, *People of the State of New York v. Operation Rescue National*, 92 Civ. 4884 (RJW), as the testimony Mahoney would have given if called to the stand in this matter. Mahoney testified that on the evening of July 13, he discussed the hearing held before this Court earlier in the day and the Preliminary Injunction with Terry, including the fact that the Preliminary Injunction was "outrageous" and "restricted . . . free speech." Defendant has not challenged Mahoney's account of this discussion. Government Ex. 22 at 62, 67.

3. Willful Violation of the Injunction

In connection with the alleged incident itself, the government must prove, beyond a reasonable doubt, that Governor Clinton was (a) "present[ed] or confront[ed]"

with (b) a "fetus or fetuses or fetal remains." It is uncontested that Terry did not present or confront Governor Clinton with a fetus himself. Therefore, in order to obtain a conviction on Count One, the government must also prove, beyond a reasonable doubt, that (c) Terry willfully aided, abetted, counseled, commanded, induced, procured or caused [5] the commission of this

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[5] Defendant notes that the Second Decretal Paragraph, Clause (5) of the Preliminary Injunction ("Clause (5)") enjoins him only from "attempting to take, or inducing, encouraging, directing, aiding, or abetting in any manner others to take, and of the actions described in *clauses (1) through (4)* above" (emphasis added). Defendant argues that, because Clause (5) does not refer to Clause (7), the Preliminary Injunction did not enjoin him from "indirectly" violating Clause (7). Based on this conclusion, Terry asserts that he can only be held in criminal contempt of court for violating Clause (7) if he personally presented or confronted Governor Clinton with a fetus.

If the Preliminary Injunction were interpreted in a legal vacuum, Terry's assertion would be correct. However, the statutory overlay does make it crime for a person to "aid[], abet[], counsel[], command[], induce[] or procure[]" the commission of an offense against the United States, 18 U.S.C. § 2(a), or to "willfully cause[] an act to be done which if directly performed by him or another would be an offense against the United States. . . ." 18 U.S.C. § 2(b). Under 18 U.S.C. § 401(3), violation of the terms of the Preliminary Injunction was an offense against the United States. Therefore, Terry may be found guilty of contempt for, in his words, "indirectly" violating the terms of Clause (7).

Furthermore, it was not necessary for this Court to have notified Terry of the operation of § 2 or § 401(3). As the Second Circuit has ruled:

> "[T]he crime of criminal contempt requires a specific intent to consciously disregard an order of the court." There is no requirement that the defendant be shown to have known of, and intended to violate, the statute which makes it a crime to consciously disregard an order of the court. In essence, [the defendant] sought a charge to the effect that ignorance of "the law" would be a defense. [The trial judge] was correct in refusing to give such a charge.

[Continued]

alleged act. Finally, to obtain a conviction under Count Two, the government must prove, beyond a reasonable doubt, that (d) Terry believed Belew planned to violate the Preliminary Injunction and did not make a good faith effort to instruct Belew not to do so.

a. The Alleged Presentation or Confrontation

The Court finds, beyond a reasonable doubt, that Harley David Belew presented Governor Bill Clinton with an object, which appeared to be a human fetus,[6] contained in a clear plastic container at approximately 8:00 a.m. on July 14, 1992, on the sidewalk outside an entrance to the Hotel Inter-Continental, in the Southern District of New York.

In making this finding, the Court draws on the testimony of William Patrick Glenn, a special agent with the United States Secret Service; Irving F. Donaldson, a lieutenant with the New York City Police Department; and John T. Wnek, a New York City police officer. All three witnesses observed the events that occurred immediately after Governor Clinton exited the Hotel Inter-Continental on the morning of July 14, 1992. In addition, the Court has examined two photographs taken at that time. Government Exs. 1 & 2.

The evidence establishes that, as Governor Clinton was entering his limousine at approximately 8:00 a.m. on

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[5] [Continued]

United States v. Berardelli, 565 F.2d 24, 30 (2d Cir.1977) (citations omitted), *quoted in United States v. Remini*, 967 F.2d 754, 757 (2d Cir.1992).

Finally, Terry's counsel was present throughout the July 13 Hearing, when the Preliminary Injunction was issued. If he had any questions or required any clarification concerning the interplay between Clause (5) and 18 U.S.C. § 2, there was ample opportunity to raise such concerns at that time.

[6] Whether the object presented to Governor Clinton actually was a fetus or fetal remains is discussed in subsection B.3.b., *infra*.

July 14, a man, later identified as Belew, called out to Governor Clinton, asking him for an autograph. When Governor Clinton approached Belew to oblige, Belew handed him a folded newspaper and a ball point pen. Concealed beneath the newspaper was a white plastic bag. Once Governor Clinton had taken the newspaper and the pen, Belew reached into the plastic bag and removed a clear plastic container. Inside the clear plastic container was an object which appeared to be a human fetus. At this point, a photograph, Government Ex. 1, shows Belew's hands extended toward Governor Clinton and holding the clear plastic container so that Governor Clinton could see the object in the container. Belew then said to Governor Clinton, "What about the babies?".

Webster's New World Dictionary of the American Langauge, Second College Edition defines "present" as, *inter alia*, "to offer for viewing or notice; exhibit; display; show." There is no reasonable doubt in the Court's mind that Belew "presented" the clear plastic container to Governor Clinton, or, put in terms of the dictionary definition, he "offer[ed the container] for viewing or notice" by Governor Clinton. Belew purposely removed the clear plastic container from the white plastic bag and made a comment to Governor Clinton relating to the contents of the clear plastic container. Furthermore, because the container was clear, so that it contents were visible, any presentation of the container is, by definition, a presentation of its visible contents. Therefore, Belew also presented the object in the container to Governor Clinton.

Defendant asserts that Belew did not present Governor Clinton with the contents of the clear plastic container because Governor Clinton "exposed" himself to the clear plastic container by taking the newspaper from Belew's hands.[7] This argument is not convincing for two reasons.

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[7] Defendant's argument conflicts with an account of the incident contained in a press release issued on his letterhead on July 14:

First, Lieutenant Donaldson testified that, once Governor Clinton took the newspaper from Belew's hands, Belew removed the clear plastic container from a white plastic bag.[8] A bag of that description is visible in Belew's hand in the photograph of Belew and Clinton. Government Ex. 1. Therefore, Belew presented Governor Clinton with the fetus by removing the clear plastic container from the white plastic bag after Governor Clinton had taken the newspaper. Second, assuming, *arguendo*, that Governor Clinton's acceptance of the newspaper was the final act which exposed him to the object in the clear plastic container, this Court still finds that Belew presented the object in the container to Governor Clinton. By asking Governor Clinton to autograph the newspaper, it was Belew's intention that Governor Clinton would take the newspaper, thereby exposing what lay underneath, in much the same way that a person might give a boxed and wrapped gift to another with the expectation that the recipient will unwrap the gift and "expose" himself to what is inside the box. In such a case, the giver has "presented" the gift to the recipient. Likewise, the Court finds, beyond a reasonable doubt, that Belew presented the clear plastic container and its contents under a newspaper to Governor Clinton with the expectation that Governor Clinton would remove the newspaper and "view[] or notice" the package's contents.

> *An Operation Rescue activist has handed* an aborted baby to Governor Bill Clinton, at approximately 8:30 A.M. this morning as Governor Clinton was exiting the Intercontinental Hotel where he is staying. Operation Rescue activist, Harley David [sic], approached Governor Clinton to request an autograph. At that time *he produced baby Nathan*, a baby boy aborted at 19 weeks gestation.

Government Ex. 19 (emphasis added).

[8] Although neither Special Agent Glenn nor Officer Wnek mentioned the white plastic bag, their testimony is not inconsistent Lieutenant Donaldson's testimony concerning its existence.

Accordingly, the government has met its burden of proof in establishing that Belew presented Governor Clinton with the clear plastic container and its contents.

b. The Alleged Facts

The government has proven, beyond a reasonable doubt, that the object in the clear plastic container presented to Governor Clinton was a fetus. This finding is based upon the Court's review of the trial testimony given by Dr. Dennis Smyth, the New York City Medical Examiner who inspected the object contained in the clear plastic container, as well as Dr. Smyth's autopsy report, Government Ex. 6.

The Report of Autopsy, signed by Dr. Smyth on July 16, 1992, states:

> "I, HEREBY CERTIFY THAT I, DR. DENNIS SMYTH M.D., CITY MEDICAL EXAMINER II HAVE PERFORMED AN AUTOPSY ON THE BODY OF A *FETUS* AT THE MANHATTAN MORTUARY ON THE 15TH DAY OF JULY 1992.
>
> EXTERNAL EXAMINATION:
>
> The body is that of a . . . male *fetus*. . . ."

Government Ex. 6 (underscoring added). Defendant presented no testimony or other evidence to controvert Dr. Smyth's written finding.

Defendant argues that there is a legitimate question as to whether the object in the clear plastic container was a fetus or a stillborn and that, for this reason, the government has not met its burden of proving that the object was a fetus. The Court disagrees.

The Report of Autopsy does state "DIAGNOSIS: STILLBORN." *Id.* Accordingly, Dr. Smyth found the object to be a stillborn fetus. This does not, as defendant appears to argue, create uncertainty as to what was in

the plastic container. Just as a person can be diagnosed as having cancer, a fetus can be diagnosed as stillborn.[9] Despite defendant's arguments to the contrary, nothing in the medical examiner's testimony at trial refutes this conclusion.

In addition, as the government points out, if a dead fetus ceases to be a fetus once it is removed from the uterus, then that part of Clause (7) referring to "fetus or fetuses" would enjoin action which is, for all practical purposes, impossible: a person could not "present or confront" Governor Clinton or Senator Gore with an object which remained in utero. A "defendant may not avoid criminal contempt by 'twisted interpretations' or 'tortured constructions' of the provisions of the order." *United States v. Greyhound Corp.*, 508 F.2d 525, 532 (7th Cir.1974) (quoting *United States v. Gamewell Co.*, 95 F.Supp. 9, 13 (D.Mass.1951)). By interpreting Clause (7) as only applying to an in utero fetus, Terry has created such a "tortured construction."

Furthermore,

> a defendant, if he has doubts as to his obligations under an order, may petition the court for a clarification or construction of that order. While a defendant is, of course, not required to seek such a clarification, a failure to do so when combined with actions based upon a twisted or implausible interpretation of the order will be strong evidence of a willful violation of the order.

United States v. Greyhound Corp., 508 F.2d at 532 (citations omitted).

As noted above, Terry was represented by counsel at the July 13 Hearing. This Court has already indicated that,

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[9] "Stillborn" can be either an adjective or a noun. Webster's Third New International Dictionary (1981).

> [t]he Preliminary Injunction's prohibition against "presenting or confronting . . . Governor Bill Clinton . . . with any fetus or fetuses or fetal remains in the City of New York" . . . was the subject of considerable discussion at the July 13 Hearing, and if counsel for Terry had any doubt as to this prohibition's meaning or scope, he had ample opportunity to raise questions and seek clarification at that proceeding.

United States v. Terry, 802 F.Supp. 1094, 1102 (S.D.N.Y. 1992).

Finally, the government has met its burden of proving that the fetus examined by Dr. Smyth was the object in the clear plastic container that Belew presented to Governor Clinton on the morning of July 14. Despite the fact that the object in the plactic container was not seized at the time it was presented to Governor Clinton, the government has proved, beyond a reasonable doubt, that the object displayed by Joseph Foreman at the 9:30 a.m. press conference in the lobby of the Hotel Inter-Continental was the object presented to Governor Clinton.[10] This object was then sent to Dr. Smyth in the Office of Chief Medical Examiner and was later identified as a stillborn fetus.

For all of the above reasons, the Court finds that the object in the clear plastic container presented to Governor Clinton was a fetus, in violation of a specific and definite term of Clause (7) of the Preliminary Injunction.

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[10] A July 14 press release, issued on Terry's letterhead, briefly describes the incident with Governor Clinton, stating that at the time he approached Governor Clinton, "*[Belew] produced baby Nathan . . . .* Shortly there after [sic] *the New York City police confiscated baby Nathan.*" Government Ex. 19 (emphasis added). By statements on his own letterhead, Terry has provided strong proof of the chain of custody.

c. The Alleged Willful Violation of Clause (7) of the Second Decretal Paragraph

The government does not allege that Terry directly violated the terms of Clause (7) by presenting or confronting Governor Clinton with a fetus or fetal remains. Rather, defendant is accused of "aiding, abetting, counseling, commanding, inducing, procuring or causing" Belew to act in violation of Clause (7) and 18 U.S..C §§ 2 and 401(3). Notice of Charge ¶ 3.

Terry's own uncontested public pronouncements, both before and after Belew presented the fetus to Governor Clinton, establish, beyond a reasonable doubt, that defendant willfully caused Belew to violate Clause (7). In addition, the government introduced other testimony and evidence establishing Terry's link to the presentation of the fetus. Viewed as a whole, the evidence that Terry willfully caused Belew to violate Clause (7) is overwhelming.

(i) Terry's Public Pronouncements Prior to July 14

The evidence introduced at trial demonstrated that Randall Terry, prior to July 14, made numerous statements to his supporters and the press concerning his plans to present Governor Clinton with a fetus:

—a statement in a letter dated July 3 and signed by the defendant indicated that "We're planning on having several aborted children with us in NY to bring the Democratic Party and Bill Clinton face to face with the horrifying reality of their position on child-killing." Government Ex. 15;

—the parties stipulated that, if called to the stand, Meg Handler would have testified that, on July 11, she was present in front of the Eastern Women's Center on East 30th Street in Manhattan, when she observed Randall Terry, Patrick Mahoney, Robert

Schenck and Paul Schenck holding a fetus in their hands. A comparison of photographs taken at this scene with the medical examiner's photographs of the fetus presented to Governor Clinton on July 14 establish, beyond a reasonable doubt, that the fetus held by Randall Terry on July 11 was the same fetus that was presented to Governor Clinton and later identified by Dr. Smyth. Ms. Handler would have testified that she heard Randall Terry speak at this location and she heard him say that "he was going to present the fetus to Governor Clinton to show him the victim of choice." Tr. at 175; *see also* Government Ex. 32 (videotape excerpt of July 11 WNBC television news broadcast showing defendant standing in front of abortion clinic on July 11, holding a fetus, and saying, "Our most important mission is to get in Bill Clinton's hands a little dead baby boy who was aborted—the victim of choice.")

—a press release issued by defendant on July 11 in which defendant stated that he and others displayed an aborted child that morning at a press conference outside the Eastern Women's Center in New York City. He also indicated that he and Reverend Schenck said, "our main purpose over the next four days is to place this aborted child into Bill and Hillary Clinton's hands." Government Ex. 16;

—a videotape excerpt from a July 13 television news broadcast on WABC showed Randall Terry, during the afternoon of April 13 saying, "our hope is sometime between now and the end of the convention to place in Bill Clinton's hands the victim of choice—a dead baby." Government Ex. 33;

—Michael Allen Gagne testified that, on the evening of July 13, he attended an Operation Rescue rally at St. Agnes Church. He testified that Terry spoke at that rally, and that, "[Terry] said that they had the fetus at the hotel, and that they had planned to pre-

sent the fetus to Bill Clinton." Tr. at 141. Gagne also testified that, during the Operation Rescue rally at St. Agnes church on July 13, Robert Schenck, a defendant in the underlying civil action, "said that he and Randall Terry and Joe Foreman . . . were going to present the fetus to Bill Clinton at the hotel for the best media coverage that would be there." *Id.*

(ii) Terry's Public Pronouncements After Presentation of the Fetus

Moreover, after the presentation of the fetus to Governor Clinton, Terry made a number of statements to the press or on his live radio show which demonstrated his active involvemenet with Belew's violation of Clause (7):

—on his live radio show broadcast within hours of the presentation of the fetus to Governor Clinton, Terry indicated,

> And so we made a commitment two days ago, three days ago, that we were going to try to present Governor Clinton with an aborted baby, and this morning, by the grace of God, Harley David [Belew] . . . stepped into legendary history when he presented an aborted baby to Governor Clinton.

Government Ex. 28. Defendant then described his own participation in the development of the plan to present Governor Clinton with the fetus:

> This is a very sober thing that we have done, folks. *Late last night, we were praying and plotting*—in fact, on Saturday, we were praying and fasting, asking God to grant us a miracle that we would be able to present this baby to Clinton.

Id. (emphasis added). Later, defendant described, during a telephone exchange with Belew, the "three-tier plan" that he, Belew and others developed the

night before the fetus was presented to Governor Clinton:

> DEFENDANT: [*L*]*ast night, we came up with a three-tier plan . . .*
>
> BELEW: Right.
>
> DEFENDANT: . . . to present Governor Clinton with this baby. *Plan A was what Harley did.*
>
> . . . . .
>
> So, *thank God, Harley, that you* got up this morning and *went forward with the first tier of the plan. But we had moderate hopes at best that this would work this morning.*

Id. (emphasis added).

Later, defendant again tied himself to Belew's violation of Clause (7):

> It's unbelievable that things have worked out, but I'm here in New York, Rev. Mahoney is with me, Rev. Schenck, Rev. Foreman, Harley David, and, by the grace of God, we prayed, we fasted, and this morning, *we were able* to present baby Nathan to Governor Clinton.

Id. (emphasis added).

—on a FOX television news broadcast, defendant appears on the steps of the United States Court House on July 16 saying,

> Since *we* tried to present him with an aborted baby, we may be imprisoned. They're trying to crush us because of our 'politically incorrect' speech.

Government Ex. 4B (emphasis added).

(iii) Relationship Between Terry and Belew

Finally, the government produced unrefuted evidence which established a close working relationship between Terry and Belew, including: (1) Belew's work for Terry's live radio show and (2) a trip Belew and Terry took to Washington, D.C. in early April of 1992 to be present at "NOW's death march." Government Ex. 14.

(iv) Conclusion

Randall Terry proclaimed to his supporters and the press his intention to present a "victim of choice" to Governor Clinton at the Democratic National Convention. Following the events on the morning of July 14, defendant told listeners to his live radio show of his involvement in a three-tier plan to present an "aborted baby" to Governor Clinton. Terry cannot now escape the clear meaning of his own words. Therefore, the government has met its burden of establishing that defendant willfully caused Belew to present a fetus to Governor Clinton.

d. The Alleged Willful Violation of the Fourth Decretal Paragraph

In order to establish a violation of the fourth decretal paragraph and Count Two of the Notice of Charge, the government must prove, beyond a reasonable doubt, that (i) Terry believed that Harley David Belew was planning to violate any of the activities enumerated in clauses (1) through (7) of the second decretal paragraph and (ii) Terry did not make a good faith effort to instruct Belew not to engage in the proscribed activities.

The government has met its burden of proof with respect to the first prong of Count Two: Terry's own statements, described in subsection B.3.c.(ii), *supra*, establish, beyond a reasonable doubt, that Terry believed Belew was planning to present a fetus to Governor Clinton, in violation of Clause (7).

However, the government has not proved, beyond a reasonable doubt, that Terry did not make a good faith effort to instruct Belew not to engage in the proscribed activities. The government's burden here is extremely difficult: in order to establish a violation of the fourth decretal paragraph, it must prove a negative, namely that Terry did *not* do something. The government has not done this beyond a reasonable doubt. For example, two telephone calls were placed during the morning of July 14, before the fetus was presented to Governor Clinton, from the room at the Milford Plaza where Terry and Patrick Mahoney were staying to the Hotel Inter-Continental, where Belew was staying. One telephone call commenced at 12:25 a.m. and the other commenced at 7:43 a.m. No evidence has been presented by either side as to the content of these telephone calls or parties involved. Nevertheless, it is not beyond the realm of possibility that one or both of these calls involved Terry and Belew and that, at one point during the call, Terry may have told Belew not to go forward with the plan to present a "victim of choice" to Governor Clinton, for whatever reason. Given Terry's public statements, such a scenario is rather unlikely. However the Court is not prepared to say that it is not possible, beyond a reasonable doubt.

Short of a complete accounting of all conversations between Terry and Belew from the time of the issuance of the Preliminary Injunction on July 13 to the presentation of the fetus to Governor Clinton on July 14, the government cannot establish with the requisite level of certainty that Terry did not instruct Belew, at some point in time, not to engage in the proscribed activities. Inasmuch as neither Terry nor Belew has testified concerning the content of their conversations during this time period, the government has not met its burden of proof to sustain a conviction on Count Two.

C. *Findings of Guilt*

1. Count One

In Count One, defendant is charged with violating 18 U.S.C. § 2. As the Second Circuit recently explained, the elements of proof are different under § 2(a) than they are under § 2(b). *See United States v. Concepcion*, 983 F.2d 369, 383-84 (2d Cir.1992). In the instant matter, this Court does not find a violation of § 2(a), but does find a violation of § 2(b).

"Under § 2(a), 'an aider and abetter must share in the principal's essential criminal intent, [and] *the principal must be shown to have had the essential criminal intent.*' " *Id.* at 383 (emphasis added) (quoting *United States v. Elusma*, 849 F.2d 76, 78 (2d Cir. 1988), *cert. denied*, 489 U.S. 1097, 109 S.Ct. 1570, 103 L.Ed.2d 936 (1989)).

The government has not proven, beyond a reasonable doubt, that Belew, the person who presented the fetus to Governor Clinton, had the requisite criminal intent.[11] Therefore, the Court finds Terry did not violate 18 U.S.C. § 2(a).

However, the Second Circuit has indicated that,

> [t]he requirements of § 2(b) . . . are somewhat different. Whereas § 2(a) speaks in terms of procuring or aiding and abetting the commission of an "offense," and hence requires proof that the primary actor had criminal intent, § 2(b) speaks in terms of causing the actor to perform only an "act.". . . Thus § 2(b) adopts the "general principle of causation in criminal law that an individual (with the necessary intent) may be held liable if he is a cause in fact of the criminal violation, even though the result which the law condemns is achieved through the actions of

---

[11] For example, the government did not prove, at trial, that *Belew* had notice of the terms of the Preliminary Injunction.

> innocent intermediaries." . . . Accordingly, the person who actually performed the act need not have had any criminal purpose or intent; if the defendant willfully caused an act that, had he performed it directly, would be an offense against the United States, he may be prosecuted under § 2(b) "even though the agent who committed the act is innocent or acquitted."

United States v. Concepcion, 983 F.2d at 383-84 (citations omitted).

Thus, even if Belew is not guilty of any crime in connection with the presentation of the fetus, defendant may still be found guilty under § 2(b). The Court has found: (a) that Terry had notice of the terms of the Preliminary Injunction and (b) that he willfully caused Harley David Belew to violate the specific and definite terms of Clause (7). Accordingly, this Court finds Terry guilty of criminal contempt of court as charged in Count One, in violation of 18 U.S.C. §§ 2(b) and 401(3).

2. Count Two

As discussed in subsection B.3.d., *supra*, the government has not proven, beyond a reasonable doubt, that defendant violated the fourth decretal paragraph of the Preliminary Injunction. Accordingly, the Court finds defendant not guilty with respect to Count Two.[12]

It is so ordered.

---

[12] Because of this finding, it is not necessary for the Court to address defendant's argument that a conviction on both Counts One and Two would violate the Double Jeopardy Clause of the Fifth Amendment.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

92 Cr. Misc. #1 P. 46 RJW

UNITED STATES OF AMERICA

v.

RANDALL TERRY,

Defendant.

June 11, 1993

Before: HON. ROBERT J. WARD, District Judge

* * * *

[38] THE COURT: The court is prepared to impose sentence.

I have before me Randall Terry. Mr. Terry is 34 years of age. He is married. I believe his wife is still here in the courtroom. I saw her this morning. He has had some college. He is an extremely articulate individual, and for a number of years has been closely involved with Operation Rescue.

I listened as he spoke. He is clearly articulate. He has spoken of his mission. To the extent his mission involves speech, I would be prepared to defend it to the end. Yet there is something here that is missing. What is missing is respect for the law. We had a proceeding [39] here. The court issued an order after the hearing and advised the parties, should they disagree, that there was another court on the 17th floor of this very building available to review the order which this court issued.

After leaving the courtroom, several of the individuals concerned, including the Reverend Mahoney, whose name was mentioned earlier, were photographed on the steps of this courthouse, indicating that it was their plan to take an appeal. If they had done so, it would have indicated that they were prepared to follow the course and await the ruling of the appellate court. But that is not what happened. There was no attempt to vacate or in some way modify this court's order. Instead the parties took the matter into their own hands and acted in flagrant disregard of the order of the court.

Put aside the symbolism of tearing up the paper, but keep in mind whether there was respect for the law. There wasn't. Mr. Terry believes that he answers to a higher authority and indeed all of us believe that there is such a higher authority. Nevertheless, this country was founded with a constitution and laws. Indeed there have been laws which the public has been unhappy with. The Volstead Act was one. The prohibition laws were widely flaunted and violated, and the statute ultimately repealed.

The forum in this country includes the [40] legislative, executive, and judicial branches of the government, and protest in the streets, peaceful protest, speaking your mind, and petitioning the government are clearly protected. The courts are here to enforce First Amendment rights.

Unfortunately, when Mr. Terry spoke earlier, he spoke briefly concerning respect for the law, but then indicated clearly that it is respect for the law or laws with which he agreed.

A sentencing judge who is required to impose a period of confinement or a fine in a criminal matter looks to what the purpose of the proceeding is. Two purposes include punishment and deterrence. It is clear to this court that if the maximum sentence would be imposed here, and, as was pointed out, sentences have been imposed by other courts on Mr. Terry, this would likely act as a temporary deterrence, that is, only for the period

during which he was confined, because when he returns, he appears determined to resume his activities.

I would note that there is pending in Congress at this time legislation which would make certain of the activities here a violation of the federal criminal law, going beyond contempt. It seems that the efforts of the defendant and his adherents would better be served in persuading the legislative and possibly the executive [41] branches of our government.

Unfortunately, when the defendant spoke, he demonstrated no remorse, no contrition, no respect for the law. He exercised his right to proceed to trial. To his credit, he did not take the stand and give false testimony. On the other hand, he has not acknowledged responsibility. The guidelines that speak of that factor are irrelevant here and I will not dwell on the guidelines further. It is for this court to determine what is appropriate to carry out the purpose for which we are here. The purpose essentially is punishment and deterrence. I have spoken with regard to deterrence. I am left, reluctantly, with punishment. It becomes incumbent upon this court to determine the appropriate nature and degree of punishment.

After considering the matter further, I have made the following determination. This is the sentence of the court:

It is adjudged that on Count 1 the defendant is hereby committed to the custody of the Attorney General or her authorized representative for imprisonment for a term of five months, together with a special assessment in the amount of $10, as required by law. That is the sentence of the court.

* * * *

APPENDIX G

[Filed Jun. 14, 1993]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case Number: 92 Cr. Misc. #1 Pg. 46(RJW)

UNITED STATES OF AMERICA

v.

RANDALL TERRY

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.

☒ was found guilty on count 1 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
Title 18, U.S. Code, Sections 2, 401(3); Rule 42(b), F.R. Cr. P.	Criminal Contempt. (Class B misdemeanor)	7/14/92	1

Pursuant to Section 1B1.9 of the Sentencing Guidelines, the Sentencing Guidelines are not applicable for any offense that is a Class B or Class C misdemeanor.

The defendant is sentenced as provided in page 2 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty of count 2, and is discharged as to such count(s).

☐ Count(s) 1 (is) (are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $10.00, for count 1, which shall be due

☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 111-54-3564

Defendant's Date of Birth: 4/25/59

Defendant's Mailing Address:

2759 Colesville Road
Harpersville, New York 13787

Defendant's Residence Address:

Same as above

June 11, 1993
Date of Imposition of Sentence

/s/ Robert J. Ward
Signature of Judicial Officer

HON. ROBERT J. WARD
U.S.D.J.
Name & Title of Judicial Officer

June 11, 1993
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Five(5) Months on count 1.

Defendant continued on bail pending appeal.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States marshal.

☐ The defendant shall surrender to the United States marshal for this district.

☐ at ——— a.m. / p.m. on ———.

☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

☐ before 2 p.m. on ———.

☐ as notified by the United States marshal.

☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ——— to ——— at ———, with a certified copy of this judgment.

———
United States Marshal

By ———
Deputy Marshal

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

92 Civ. 4884 (RJW)

PEOPLE OF THE STATE OF NEW YORK, by ROBERT ABRAMS, Attorney General of the State of New York,
Plaintiffs,

-against-

OPERATION RESCUE NATIONAL, also known as OPERATION RESCUE, RANDALL TERRY, RANDALL TERRY d/b/a OPERATION RESCUE, KEITH TUCCI, YOUTH FOR AMERICA, MISSIONARIES TO THE PRE-BORN, JOSEPH FOREMAN, B.O.R.N., PATRICK MAHONEY, and JOHN DOE(S) and JANE DOE(S),
Defendants.

ORDER TO SHOW CAUSE AND
TEMPORARY RESTRAINING ORDER

Upon consideration of the Amended Complaint of plaintiffs People of the State of New York, the affidavit of Shelley B. Mayer, Esq., sworn to July 8, 1992, the affidavit of Michael R. Finamore, sworn to July 8, 1992, and the accompanying memorandum of law, and pursuant to Rule 65 of the Federal Rules of Civil Procedure;

IT IS HEREBY ORDERED that defendants show cause before the Honorable Robert J. Ward, United States District Judge, in Room 1505, United States Courthouse, Foley Square, New York, New York on the 13th day of July, 1992 at 10:30 o'clock A.M., or as soon thereafter as counsel may be heard, why an order should

not be made and entered pursuant to Rule 65 of the Federal Rules of Civil Procedure preliminarily enjoining defendants from violating the Ku Klux Klan Act of 1871, 42 U.S.C. § 1985(3), New York Executive Law § 296, New York Civil Rights Law § 40-c, the common law of nuisance and trespass, and New York Public Health Law § 4162, *inter alia,* (a) by blocking access to or egress from facilities where abortion related services are performed or intimidating, harassing or interfering with patients or medical staff attempting to gain access to those facilities; (b) by interfering with the right of delegates to the Democratic National Convention ("DNC") to assemble to advocate support for candidates for President and Vice-President; and (c) by preventing or hindering New York State or local authorities from securing to all persons within New York State the equal protection of the law; and

IT IS FURTHER ORDERED that, pending the hearing of plaintiffs' motion for a preliminary injunction, defendants, the officers, directors, agents, and representatives of defendants, and all other persons known or unknown, acting in their behalf or in concert with them, in any manner or by any means, are temporarily restrained from:

1. trespassing on, blocking, or obstructing, ingress into or egress from any facility, at which abortions are performed in New York City and in all locations within the Southern District of New York;

2. demonstrating within fifteen (15) feet from either side of or in front of doorways or doorway entrances of such facilities or within fifteen (15) feet of any person seeking access to or leaving those facilities, except that the form of demonstrating known as sidewalk counseling by no more than two (2) persons as specified in paragraph (3) shall be allowed, and provided

that persons escorting patients to or from a facility at which abortions are provided shall not be deemed in violation of this provision;

3. physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving or crowding persons entering or leaving, working at or using any services at any facility at which abortions are performed in New York City and at all locations within the Southern District of New York; provided, however, that sidewalk counseling consisting of a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel shall not be prohibited; also provided that no person is required to accept or listen to sidewalk counseling, and that if anyone or any group of persons who is sought to be counseled wants not to have counseling, to leave, or to walk away, that person or group of persons shall have the absolute right not to be counseled, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of paragraph (2) prohibiting demonstrations within fifteen (15) feet of persons seeking access to or leaving a facility;

4. using any mechanical loudspeaker or sound amplification device or making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or employee of any facility at which abortions are performed;

5. attempting to take, or inducing, encouraging, directing, aiding, or abetting in any manner others to take, any of the actions described in clauses (1) through (4) above;

6. harassing, intimidating or physically abusing any doctor who performs abortions, any provider of abortion services or any operator or employee of a facility that provides abortion services at his or her place of residence;

7. trespassing, blockading, sitting in, impeding or obstructing access to, ingress into, or egress from any place where activities of the DNC are scheduled to be held or are held in the City of New York or elsewhere in the Southern District of New York; and

* * * *

IT IS FURTHER ORDERED that nothing in the Court's Order should be construed to limit defendants and those acting in concert with them from exercising their legitimate First Amendment rights; and

IT IS FURTHER ORDERED that defendant organizations and their officers and agents, and all individual defendants and those acting in concert with them, shall make good faith efforts to instruct all organizations and individuals they believe to be planning to participate in any of the activities enumerated in clauses (1) through (7) of the second decretal paragraph above not to engage in the proscribed activities; and

IT IS FURTHER ORDERED that defendant organizations and their officers and agents, and all individual defendants and those acting in concert with them, shall provide to the United States Marshal for the Southern District of New York, the Attorney General of the State of New York, the Commissioner of the New York City Police Department or his appointed deputy, and any other official responsible for law enforcement in the jurisdiction at which a demonstration is planned, notice of the location and time of any demonstration against the provision of abortion-related services at least twenty-four hours in advance of any such demonstration; and

IT IS FURTHER ORDERED that the failure to comply with the Court's Order by any defendant or anyone acting in their behalf or in concert with them shall subject each person to civil damages of $25,000 per day for the first violation of the Court's Order, a civil contempt fine double that of the previous fine for each successive violation, and to joint and several liability for all attorneys' fees and related costs incurred by plaintiffs in relation to enforcement of any Order of this Court; and

IT IS FURTHER ORDERED that a member or representative of the local police department or sheriff (1) shall read the Court's Order at the site of any demonstration or protest at a facility at which abortions are performed in New York City or in the Southern District of New York, and at any abortion demonstration or protest at the DNC, and (2) to the extent that local law enforcement authorities are unable to obtain compliance with this Order, the United States Marshal shall enforce the terms of the Court's Order by promptly arresting any person in violation of the Order; and

IT IS FURTHER ORDERED that service of a copy of this Order, together with the affidavits and memorandum in support thereof, upon each of the defendants, shall constitute good and sufficient service of this Order if mailed by overnight, express mail on or before 5:00 o'clock P.M. on the 9th of July, 1992; and

IT IS FURTHER ORDERED that nothing contained in this Order shall supersede or diminish the obligation of local and state law enforcement authorities to fulfill their duties and responsibilities in enforcing state laws and local ordinances.

IT IS FURTHER ORDERED that answering affidavits and answering memoranda shall be personally served upon the attorneys for plaintiffs no later than 9:00 o'clock a.m. on the 13th of July, 1992.

Dated: New York, New York
July 9th, 1992

Time: 11:15 a.m.

/s/ Robert J. Ward
United States District Judge

After hearing the parties and for the reason set forth in open Court on this date the temporary restraining order issued on July 9, 1992 at 11:15 a.m. is adopted and entered as the preliminary injunction in this action with the following amendments:

1) Phrase (b) contained within the first decretal paragraph on page 2 is deleted;

2) Paragraph 7 on page 5 is deleted and replaced by:

"7. presenting or confronting either Governor Bill Clinton or Senator Albert Gore with any fetus or fetuses or fetal remains in the City of New York or elsewhere in the Southern District of New York between the time of the issuance of this order and 12:00 midnight on July 7, 1992; and

3) The phrase "and at any abortion demonstration or protest at the DNC," in the first full decretal paragraph on page 7 is deleted.

It is so ordered.

Dated: New York, New York
July 13, 1992, 12:45 p.m.

/s/ Robert J. Ward
United States District Judge

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of April one thousand nine hundred and ninety-four.

Docket Number: 93-1440

UNITED STATES OF AMERICA,
Appellees

v.

RANDALL A. TERRY,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for Randall A. Terry,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III
Clerk

/s/ Carolyn Clark Campbell
CAROLYN CLARK CAMPBELL
Chief Deputy Clerk

Supreme Court, U.S.
FILED
SEP 23 1994
OFFICE OF THE CLERK

No. 94-141

In the Supreme Court of the United States

OCTOBER TERM, 1994

RANDALL A. TERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOSEPH DOUGLAS WILSON
Attorney

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Washington, D.C. 20530
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QUESTION PRESENTED

Whether the district court erred in appointing the Attorney General of the State of New York, who represented the State in obtaining a preliminary injunction against petitioner, to prosecute criminal contempt charges based on the allegation that petitioner had violated the injunction.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-141

RANDALL A. TERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 17 F.3d 575. The opinion of the district court denying petitioner's motion for recusal and finding the preliminary injunction constitutional (Pet. App. 13a-31a) is reported at 802 F. Supp. 1094. The district court's opinion denying petitioner's motion for disqualification (Pet. App. 32a-47a) is reported at 806 F. Supp. 490. The district court's opinion finding petitioner in criminal contempt (Pet. App. 48a-67a) is reported at 815 F. Supp. 728.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 1994. A petition for rehearing was denied

on April 22, 1994. Pet. App. 80a. The petition for a writ of certiorari was filed on July 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted of criminal contempt, in violation of 18 U.S.C. 401(3). He was sentenced to five months' imprisonment. The court of appeals affirmed. Pet. App. 1a-10a.

1. On July 13, 1992, the State of New York, represented by Attorney General Robert Abrams, obtained a preliminary injunction in the United States District Court for the Southern District of New York forbidding petitioner, along with Operation Rescue National and other individuals, from "presenting or confronting either Governor Bill Clinton or Senator Albert Gore with any fetus or fetuses or fetal remains in the City of New York" during the Democratic National Convention.[1] Pet. App. 2a, 48a, 49a. On July 14, 1992, petitioner caused Harley David Belew to present then-Governor Clinton with a fetus in a plastic container in

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[1] That aspect of the preliminary injunction was based upon N.Y. Pub. Health Law § 4162 (McKinney 1985 & Supp. 1994), which governs "[t]he removal, transportation, burial or other disposition of remains resulting from a fetal death." See Gov't C.A. Br. 4 & n.4. The Attorney General of the State of New York is authorized to "bring an action for an injunction against any person who violates, disobeys or disregards any term or provision" of the Public Health Law. N.Y. Pub. Health Law § 12(5) (McKinney 1990). The injunction also required petitioner to "make good faith efforts to instruct all organizations and individuals * * * not to engage in the proscribed activities." Pet. App. 15a-16a. Petitioner was acquitted of violating that provision of the injunction. *Id.* at 64a-65a.

front of the Inter-Continental Hotel in New York City.[2] *Id.* at 54a-55a.

2. On July 15, 1992, the district court issued an order to show cause why petitioner should not be held in civil contempt for violating the preliminary injunction. At a contempt hearing on July 16, 1992, the district court noted that coercive civil contempt fines had failed to have any effect on petitioner's conduct and that criminal sanctions would be appropriate if it could be proved that petitioner had violated the preliminary injunction. The district court subsequently referred the matter to the United States Attorney for the Southern District of New York for possible prosecution of petitioner for criminal contempt. The United States Attorney declined to prosecute the alleged criminal contempt and instead suggested that the court appoint a private prosecutor. On August 5, 1992, the court, on its own initiative, inquired whether Attorney General Abrams would agree to prosecute petitioner for the alleged criminal contempt. Attorney General Abrams agreed, and the court appointed him to prosecute the criminal contempt. At the same hearing, the district court dismissed the civil contempt charges against petitioner initiated by its July 15 order to show cause. Pet. App. 33a-34a.

Petitioner moved to disqualify Attorney General Abrams from conducting the criminal contempt prose-

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[2] On several occasions prior to July 14, petitioner stated that he and his supporters planned to present Governor Clinton with a fetus. After Belew presented Governor Clinton with the fetus, petitioner admitted that he had "plott[ed]" to take that action (Pet. App. 62a), and he issued several statements taking credit for Belew's conduct. Relying on those statements, the district court found that petitioner had aided and abetted Belew's presentation of the fetus to Governor Clinton. *Id.* at 60a-64a.

cution. Pet. App. 34a. Petitioner asserted that Attorney General Abrams should be disqualified because he was involved in the underlying civil litigation and in civil contempt proceedings against other individuals arising from the July 13 injunction; because he stood to gain financially if the State of New York was awarded attorneys' fees as a prevailing party in the civil or criminal litigation; and because he harbored a personal animosity toward petitioner. In support of the last claim, petitioner filed declarations stating that Attorney General Abrams had taunted him at a pro-abortion rally on April 5, 1992, in Washington, D.C., by putting his fingers in his ears, sticking out his tongue, and telling petitioner, "[Y]ou are going to lose." In response, Attorney General Abrams filed affidavits from himself and his wife denying that he had engaged in those acts. *Id.* at 35a.

After a hearing, the district court denied petitioner's motion. At the outset, the court stated that the "central case" bearing on petitioner's motion was this Court's decision in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), which the district court construed to hold that "counsel for a party that is the beneficiary of a federal court order may not be appointed by a federal court to bring a charge of criminal contempt for an alleged violation of the underlying court order." Pet. App. 37a. In applying *Vuitton* to petitioner's motion, the court noted that Attorney General Abrams did not represent the interests of a private party but instead "occupies a position similar to that of the United States Attorney and is entitled to the same presumption of impartiality as a 'servant of the law.'" *Id.* at 39a. At the same time, the court acknowledged that "a sovereignty * * * might still face a conflict of interest in a prosecution for criminal contempt" and that "disqualifi-

cation is required when there is even the appearance of a conflict." *Ibid.*

The court rejected petitioner's claim that Attorney General Abrams should be disqualified because he had represented the State of New York in obtaining the July 13, 1992, preliminary injunction and had participated in civil contempt proceedings arising out of the alleged violation of that injunction. It found that because Attorney General Abrams was "not actively pursuing any claims in connection with the underlying civil litigation, there is not even the appearance that the prosecution for criminal contempt might be used for leverage in the underlying civil litigation or vice versa." Pet. App. 41a. In addition, the court noted, Attorney General Abrams could not derive an advantage in the civil litigation through his prosecution of the criminal contempt charges, because no grand jury had been convened to investigate the alleged criminal contempt, and Attorney General Abrams had at least as much ability to collect information under the Federal Rules of Civil Procedure as he did through discovery in a federal criminal case. *Ibid.*

The court further found that Attorney General Abrams' participation in the pending civil contempt proceedings did not raise a conflict of interest. Pet. App. 42a-43a. Because the purposes served by civil and criminal contempt are "convergent," the court held, there is no danger that a prosecutor handling related civil and criminal contempt proceedings will have to "serve two masters." *Id.* at 42a. In addition, the court noted that civil contempt proceedings against petitioner had been dismissed and that petitioner's counsel did not represent any of the defendants in the ongoing civil contempt proceedings. *Id.* at 43a.

The district court also rejected petitioner's claim that Attorney General Abrams stood to benefit financially from his prosecution of petitioner. The court noted that any fines imposed on petitioner would be paid into the federal treasury; that the court had already announced that it would not award attorneys' fees to the State of New York for its prosecution of the alleged civil or criminal contempt proceedings; and that any attorneys' fees and costs that might be awarded to New York in the underlying civil preliminary injunction litigation constituted "too remote" a benefit to require Attorney General Abrams' disqualification. Pet. App. 40a, 41a-42a, 43a.

The district court also rejected the contention that Attorney General Abrams should be disqualified because he had a personal animosity toward petitioner. Initially, the court found that neither petitioner nor Attorney General Abrams had established the truth of his version of the events of April 5, 1992. Taking petitioner's version as true, however, the court found that Attorney General Abrams' alleged actions on that day did not "demonstrate that Abrams harbors a personal animosity toward" petitioner. Pet. App. 45a. The court also rejected petitioner's contention that a television commercial broadcast by Attorney General Abrams during his campaign in the Democratic Senate primary showed his animosity toward petitioner. *Id.* at 45a-46a. Finally, the court held that "the undisputed fact that Abrams sought to obtain political gain from his prosecution of [petitioner] is not enough to disqualify him," because "[t]here is no evidence that potential political gain was the motivating force behind the Attorney General's decision to prosecute." *Id.* at 46a.

3. The court of appeals affirmed. Pet. App. 1a-10a. It agreed with the district court that this Court's decision

in *Vuitton* "focused on the danger of entrusting coercive powers of the state to counsel for a private litigant" and that "the Attorney General of the State of New York represents a sovereignty and is presumed to act with a sense of impartiality." *Id.* at 3a-4a. Although the court of appeals recognized the possibility that a government attorney could have a disabling conflict of interest, it held that "*Vuitton* does not automatically disqualify government attorneys who bring a civil action from serving as special prosecutors in a subsequent contempt proceeding[], and that where a case involves appointment of a government attorney, the court must examine the particular facts of the case to determine if reversible error has occurred." *Id.* at 5a.

The court of appeals' conclusion that Attorney General Abrams did not have "an actual or apparent conflict of interest" was based on four factors. Pet. App. 5a. First, the Attorney General's financial interest in the outcome of the underlying civil litigation was limited to the possibility that attorneys' fees might be awarded to the State, and was therefore "too remote to implicate a conflict." *Ibid.* Second, the Attorney General would not profit financially from the criminal contempt prosecution. Third, at the time of the criminal contempt prosecution, the civil contempt proceedings against petitioner had been dismissed. Finally, "at the time of the contempt prosecution there were no ongoing activities in the underlying civil action that could cloud the Attorney General's judgment in the criminal case or exert undue pressure on [petitioner]." *Ibid.*

The court of appeals also upheld the district court's finding that Attorney General Abrams did not harbor a personal bias against petitioner. Pet. App. 7a. The court agreed with the district court's conclusion that neither the alleged April 5, 1992, exchange between the Attorney

General and petitioner nor the Attorney General's campaign commercials constituted evidence of bias. Finally, the court noted that petitioner had failed to show that he suffered any prejudice as a result of the Attorney General's alleged animosity toward him. *Ibid.*[3]

ARGUMENT

Petitioner renews his contention that the district court's appointment of New York Attorney General Abrams to prosecute the criminal contempt charges against him contravened this Court's decision in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). The district court and the court of appeals correctly rejected that argument, and no other court of appeals has addressed the application of *Vuitton* to attorneys who represent a State. Further review is therefore unwarranted.

1. In *Vuitton*, private attorneys who had obtained an injunction against trademark infringement on behalf of a leather goods manufacturer were appointed to prosecute as a criminal contempt an alleged violation of the injunction. In assessing the propriety of the appointment, the Court first observed that a criminal prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at ~~all; and~~ whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." 481 U.S. at 803 (quoting *Berger* v. *United States*, 295 U.S. 78, 88 (1935)). "Because of this

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[3] The court of appeals also rejected (Pet. App. 8a-10a) petitioner's claims that the preliminary injunction was unconstitutional and that it did not prohibit the activities giving rise to his conviction. Petitioner does not pursue those claims in this Court.

unique responsibility," the Court observed, federal prosecutors are subject to demanding conflict-of-interest provisions. 481 U.S. at 803-804. The duty of the private attorney, by contrast, is not to seek justice in a dispassionate fashion, but to demonstrate "unquestioned, continuing fidelity to the client." *Id.* at 804 (quoting *Brotherhood of Locomotive Firemen & Enginemen* v. *United States*, 411 F.2d 312, 319 (5th Cir. 1969)).

This Court concluded that the district court had "erred in appointing as prosecutors counsel for an interested party in the underlying civil [trademark infringement] litigation." 481 U.S. at 802. The Court reasoned that "[a] private attorney appointed to prosecute a criminal contempt * * * certainly should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.* at 804. It noted, however, that "[t]he Government's interest is in dispassionate assessment of the propriety of [the] criminal charges," while "[t]he private party's interest is in obtaining the benefits of the court's order." *Id.* at 805. Those interests may not be "congruent," because counsel for a private party may be ethically required to pursue a prosecution that would be financially beneficial to the client or to abandon a prosecution if a lucrative settlement is offered. *Ibid.* For these reasons, the Court held that prosecution of a criminal contempt by counsel for an interested private party always carries the potential for a conflict of interest; it therefore concluded that counsel for an interested private party cannot discharge the "unique responsibility" (*id.* at 803) of the prosecutor to see that justice is done. Relying on its supervisory power, the Court accordingly held that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order." *Id.* at 809.

Even where no conflict of interest is present, the Court recognized, "prosecutors may on occasion be overzealous and become overly committed to obtaining a conviction." 481 U.S. at 808 n.18. The Court drew a sharp distinction, however, between the "structural" problem created when the lawyer conducting a criminal prosecution represents a private party in a related matter, and the "personal" problem that exists when a prosecutor, for whatever reason, manifests bias or overzealousness. *Ibid.* Where the latter problem arises, the Court stated, "the courts deal with it on a case-by-case basis as an aberration." *Ibid.* (quoting *Polo Fashions, Inc.* v. *Stock Buyers Int'l, Inc.*, 760 F.2d 698, 705 (6th Cir. 1985), cert. denied, 482 U.S. 905 (1987)).

2. Petitioner asserts that the per se rule announced in *Vuitton* applies with the same force to a State's attorney general as to counsel for a private party. As petitioner points out, see Pet. 10-11, Attorney General Abrams represented the State of New York in both the underlying civil litigation and the civil contempt proceedings, while representing the United States in the criminal contempt prosecution. Petitioner observes that "[t]he interests of the State of New York and the United States are obviously not necessarily congruent, as illustrated by litigation between the two sovereigns." Pet. 11 (citing *New York* v. *United States*, 112 S. Ct. 2408 (1992)). Petitioner contends that "[*Vuitton*]'s bright-line test" therefore precluded the appointment of the New York Attorney General to conduct the criminal contempt prosecution. Pet. 11.

In our view, this argument lacks merit. As the court of appeals recognized, see Pet. App. 4a, the district court's appointment of a state attorney general to prosecute the criminal contempt charges against petitioner does not raise the same concerns as the appointment of counsel

for a private party. An attorney general is the representative of a sovereign and acts on behalf of the public interest. "[T]he attorney-general, in an action brought by him, represents the whole people and a public interest, and not mere individuals and private rights." *People* v. *Brooklyn, F. & C.I. Ry.*, 89 N.Y. 75, 93 (1882). Accord *State by Abrams* v. *New York City Conciliation & Appeals Bd.*, 472 N.Y.S.2d 839, 841 (Sup. Ct. 1984) ("when the state does bring suit, it must be for [the] redress of wrongs done to the interests of the people as a whole and not merely to vindicate the individual or private interests of certain citizens"); *People* v. *Lowe*, 22 N.E. 1016, 1020 (N.Y. 1889); *Farmland Dairies* v. *Commissioner of N.Y. Dep't of Agric.*, 847 F.2d 1038, 1044 (2d Cir. 1988). Cf. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 600-608 (1982) (State may file suit as *parens patriae* to vindicate its "quasi-sovereign" interest in protecting the well-being of its residents). In this case, Attorney General Abrams' duty in conducting the underlying civil litigation that produced the preliminary injunction was to vindicate the interests of the public, not to demonstrate "unquestioned, continuing fidelity" to a private party. *Vuitton*, 481 U.S. at 804. Thus, the principle upon which the *Vuitton* rule is based—that the conduct of a criminal prosecution may not be entrusted to an attorney who has pledged, in the same underlying matter, to protect the interests of a private client even at the expense of the public good—generally has no application to cases in which a state official is assigned to prosecute a criminal contempt.

This is not to say that the appointment of a state attorney general to conduct a criminal contempt prosecution will always be appropriate. The State of New York and the United States are different sovereigns, and cases will inevitably arise in which their interests

diverge. There may also be instances in which either the circumstances of the underlying litigation or the prior course of dealing between state officials and the alleged contemnor creates an unacceptable risk of bias or overzealousness. We do not believe, however, that either the frequency of such conflicts or the difficulty of identifying them on a case-by-case basis is so great as to justify a per se rule of disqualification.

3. At the time that the district court initiated criminal contempt proceedings against petitioner, there were two related civil actions pending in the district court. First, the civil action that resulted in the July 13, 1992, preliminary injunction against petitioner and others remained pending. Second, Attorney General Abrams represented the State of New York in civil contempt proceedings pending against other individuals and organizations who had allegedly violated the July 13 injunction. Although Attorney General Abrams represented the State of New York in both proceedings, his participation in those actions did not require him to accept obligations incompatible with his responsibility for conducting the criminal contempt prosecution.

First, the Attorney General's participation in concurrent civil and criminal contempt proceedings does not raise the concerns addressed in *Vuitton*. Both contempt proceedings sought vindication of the same injunction and thus involved congruent interests. Moreover, petitioner was not a party to the civil contempt proceedings, because the district court had dismissed those charges against petitioner at the time that it initiated criminal contempt proceedings against him. See Pet. App. 5a, 34a.

Nor did the conduct of the underlying civil litigation require Attorney General Abrams to accept obligations incompatible with his role as public prosecutor.

Attorney General Abrams sought the preliminary injunction to ensure order and public safety during an important public event in New York City. He thereby sought to vindicate the State's interest in the protection of its residents and the enforcement of public laws, an interest entirely consistent with that of the United States and its citizens in obtaining compliance with the orders of its courts.[4]

Finally, there was no danger that the Attorney General could obtain any improper benefit in the civil actions by prosecuting the criminal contempt. Because no grand jury was empaneled, Attorney General Abrams could not use the criminal prosecution to further the State's gathering of information for the civil actions. As a party to a civil action in federal court, Attorney General Abrams could obtain at least as much information through civil discovery as he could acquire pursuant to his conduct of the criminal contempt prosecution. See Pet. App. 5a.[5]

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[4] Different concerns might be raised if the underlying civil litigation had involved, for example, the State's operation of a commercial enterprise. In that setting the interests of the State as an institution might more plausibly be distinguished from those of the public, and the role of the Attorney General could more readily be analogized to that of counsel for a private entity. Cf. *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 601 (distinguishing between State's "sovereign" and "proprietary" interests, and noting that "[a]s a proprietor, [a State] is likely to have the same interests as other similarly situated proprietors.").

[5] In support of his claim that Attorney General Abrams had an impermissible conflict of interest, petitioner notes (Pet. 7) that evidence introduced at the criminal trial, including copies of petitioner's radio broadcasts and the depositions of two individuals, "was * * * obtained through civil discovery in the underlying action." But Attorney General Abrams (or any other attorney appointed to conduct the criminal contempt prosecution) could

4. In the courts below, petitioner contended that Attorney General Abrams harbored a personal bias against him, and that Attorney General Abrams' appointment to prosecute the criminal contempt was therefore improper. See Pet. App. 7a, 44a-46a. Although the petition summarizes the testimony underlying that contention, see Pet. 6-7, petitioner appears to have abandoned that factbound claim in this Court. In any event, as the court of appeals recognized (Pet. App. 7a), *Vuitton* has no bearing on the question whether Attorney General Abrams' alleged personal animosity toward petitioner required his disqualification. *Vuitton* addresses only the "structural" problem caused by the appointment of a prosecutor whose representation of a private interest raises the risk of a conflict of interest; it does not address the "personal" problem of prosecutors who are "overzealous and become overly committed to obtaining a conviction." See *Vuitton*, 481 U.S. at 808 n.18.

5. Petitioner identifies no decision that has applied this Court's analysis in *Vuitton* to attorneys who represent a State. He contends (Pet. 12-15), however, that the court of appeals' decision conflicts with decisions of several other courts of appeals. In particular, petitioner asserts that the courts in *FTC* v. *American Nat'l Cellular*, 868 F.2d 315 (9th Cir. 1989), and *United States ex rel. SEC* v. *Carter*, 907 F.2d 484 (5th Cir. 1990), "have ruled that [*Vuitton*] applies to government attorneys." Pet. 12. Contrary to peti-

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have used a criminal subpoena to obtain the broadcasts and to compel the testimony at trial of the two individuals. Indeed, the Attorney General was prepared to call the two individuals as witnesses at trial, but petitioner stipulated to the admission of their civil deposition transcripts. Pet. App. 6a.

tioner's contention, both of those decisions are consistent with the Second Circuit's holding in the instant case.

In *American Nat'l Cellular* and *Carter*, the question was whether attorneys for a federal government agency could be appointed to prosecute as a criminal contempt a violation of a court order obtained by the agency in civil litigation. In both cases, the courts of appeals found that *Vuitton* did not dictate the answer to that question.[6] See *American Nat'l Cellular*, 868 F.2d at 319 ("We doubt the Supreme Court intended *Vuitton* to disqualify automatically any FTC attorney as 'interested' simply by virtue of employment with the agency that brought the underlying suit."); *Carter*, 907 F.2d at 486 (*Vuitton* "does not precisely control [this] case"). Instead, in each case the court examined the circumstances surrounding the appointment of the federal attorney to prosecute the criminal contempt and the conduct of the attorneys during that prosecution to determine whether the agency attorneys had "an extraneous interest * * * that may create 'the *appearance* of impropriety.'" *Carter*, 907 F.2d at 486; see *American Nat'l Cellular*, 868 F.2d at 319 (inquiring whether FTC attorneys "lack

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[6] That conclusion was surely correct. The principle that a prosecutor may not simultaneously represent the government in a criminal proceeding and a private client with potentially divergent civil interests clearly has no application to federal attorneys, whose "client" in both civil and criminal proceedings is the United States government. See *American Nat'l Cellular*, 868 F.2d at 319 ("The *Vuitton* opinion focused quite narrowly on the conflicts of interest faced by private attorneys trying to represent simultaneously both their private clients' interests and the public interest in prosecuting contemnors.").

the impartiality and appearance of impartiality that our system of justice demands of its prosecutors").[7]

Contrary to petitioner's assertion (Pet. 13), therefore, *Carter* does not stand for the broad proposition that "a government prosecutor cannot conduct parallel civil and criminal proceedings without running afoul of [*Vuitton*]."[8] Instead, the *Carter* court concluded that the facts and circumstances of the particular case "raise[d] serious doubt about the SEC's ability in this case to perform disinterestedly the duties of a special prosecutor." 907 F.2d at 487. In support of that conclusion, the court noted that the SEC attorneys remained "locked in an on-going civil struggle" with the defendant during the criminal prosecution and that the SEC had made misrepresentations in its brief on appeal

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[7] Petitioner also argues (Pet. 14) that because the Ninth Circuit in *American Nat'l Cellular* relied on two factors that are not present in this case, its approach conflicts with the analysis of the court of appeals here. That contention is without merit. Although petitioner correctly states that the Ninth Circuit focused on two factors—the involvement of the United States Attorney and the fact that different FTC attorneys prosecuted the contempt and conducted the underlying civil litigation—the court did not suggest that other factors would not be relevant in another case.

[8] To the contrary, this Court's decision in *United States* v. *John Doe, Inc. I*, 481 U.S. 102 (1987), which held that an Antitrust Division lawyer who had conducted a grand jury investigation could continue to use grand jury materials during subsequent civil proceedings, clearly presumes that a federal attorney may legitimately participate in civil and criminal proceedings involving the same potential defendants and arising from the same underlying events. See also *United States* v. *Wencke*, 604 F.2d 607, 611 (9th Cir. 1979); *United States* v. *Birdman*, 602 F.2d 547, 561-563 (3d Cir. 1979), cert. denied, 444 U.S. 1032 and 445 U.S. 906 (1980). There is no reason why a different rule should apply to prosecutions for criminal contempt.

of the criminal conviction. *Id.* at 486-487. Rather than treating the participation of the SEC attorneys in both civil and criminal proceedings as a "structural" violation subject to a per se bar, the *Carter* court thus addressed the attorneys' apparent overzealousness "on a case-by-case basis as an aberration." *Vuitton*, 481 U.S. at 808 n.18. The court of appeals here took a similar approach, inquiring whether the Attorney General had a financial or other interest that created an actual or potential impediment to his disinterested conduct of the prosecution.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

JO ANN HARRIS
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SEPTEMBER 1994

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[9] Petitioner also alleges (Pet. 12-13) a conflict between the court of appeals' decision and several other cases. The decisions on which he relies, however, simply restate the general rule announced in *Vuitton* that appointment of counsel for an interested party to conduct a prosecution for criminal contempt requires reversal of a resulting conviction. None of those cases involves attorneys representing a State, and the decisions do not address the question whether a per se bar applies to state government attorneys who have participated in the litigation from which the alleged contempt arises.

No. 94-141

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RANDALL A. TERRY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

Robert Abrams, then-Attorney General of the State of New York, and his assistant, Sanford Cohen, acted as lead and exclusive counsel for the State of New York, as plaintiff in a civil suit against Petitioner, and for the United States, as prosecutor in a consequent criminal contempt proceeding against Petitioner. Petitioner objected, relying upon the holding of this Court in *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987), that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order," *id.* at 809 (footnote omitted). The district court overruled petitioner's objection and subsequently convicted Petitioner of criminal contempt. The Second Circuit affirmed.

Petitioner renews his *Young*[1] argument before this Court. The United States, as Respondent, opposes the petition for certiorari with a straightforward—but erroneous—legal proposition, namely, that *Young* does not apply to state attorneys general. Because this contention—like the decision below—cannot be reconciled either with *Young* or with the relevant decisions of other federal courts of appeals, this Court should grant the present petition for certiorari.

I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN *YOUNG v. UNITED STATES EX REL. VUITTON ET FILS, S.A.*

In *Young,* this Court held, in the exercise of its supervisory power, that it is error to "appont[] as prosecutors [of contempt charges] counsel for an interested party in the underlying civil litigation." 481 U.S. at 802. This Court premised its holding in *Young* upon several different considerations, all ultimately stemming from the fact that dual representation inherently jeopardizes the neutrality of the appointed prosecutor.

A. This Court pointed to the "concern that representation of other clients may compromise the prosecutor's pursuit of the [U.S.] Government's interest," *id.* at 804; in particular, this Court warned of the possible subordination of the "Government's interest . . . in dispassionate assessment of the propriety of criminal charges" for the sake of the civil litigant's "interest . . . in obtaining the benefits of the court's order," *id.* at 805.

This concern applies with full force in the present case. The New York Attorney General (NYAG) and the United States took directly opposing positions both on the meritoriousness of plaintiff's principal and sole federal cause of action and on the propriety of prosecuting Peti-

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[1] The Respondent refers to the *Young* case as the *Vuitton* case. The label is immaterial.

tioner for criminal contempt. NYAG Abrams brought suit under 42 U.S.C. § 1985(3) and appeared as amicus in support of a similar claim in this Court. *See* Brief of the Attorneys General of New York and the Commonwealth of Virginia as Amici Curiae in Support of Respondents, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (No. 90-985). The United States, by contrast, appeared as amicus in opposition to the § 1985(3) claim before this Court. *See* Brief for United States as Amicus Curiae Supporting Petitioners, *Bray* (No. 90-985). (This Court subsequently vindicated the position of the United States in its decision in *Bray*.) The NYAG prosecuted Petitioner for criminal contempt. The U.S. Attorney, by contrast, declined to prosecute this contempt action because of the position taken by the United States in *Bray*. Pet. at 4-5. One could hardly imagine more explicitly contrary legal positions or more graphically conflicting interests.

More importantly, this Court focused in *Young* upon "the *potential* for private interest to influence the discharge of public duty," 481 U.S. at 805 (emphasis in original), "[r]egardless of whether . . . any prosecutorial impropriety" actually resulted, *id.* The United States concedes in the present case the "[t]he State of New York and the United States are different sovereigns, and cases will inevitably arise in which their interests diverge." Opp. at 11-12. This is precisely why the Second Circuit erred by creating an exception to *Young* for state government attorneys. "Given this *inherent conflict in roles*, there is no need to speculate whether the [appointed] prosecutor will be subject to extraneous influence." 481 U.S. at 807 (emphasis added; footnote omitted).

B. In *Young*, this Court also identified other considerations supporting its holding that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order," *id.* at 809 (footnote omitted). Among these additional considerations were the ethical

concern of placing an attorney in a situation rife with potential conflicts of interest, *id.* at 803-04 & n.14, the potential for abuse of discovery for the sake of its cross-use in parallel proceedings, *id.* at 806-07, and the sheer "appearance of impropriety" in "the appointment of counsel for an interested party to bring the contempt prosecution," *id.* at 806 (emphasis in original).

These additional concerns apply with equal force to the present case.

As already noted—and as the United States concedes—state attorneys general will "inevitably" encounter conflicts between their obligation to represent the state and their obligation to represent the United States. The present case presents a classic illustration of such a conflict, given the exactly opposite positions these sovereigns took both as to plaintiff's federal claim and as to the propriety of bringing the present criminal contempt prosecution. Hence, the NYAG faced (and disregarded) serious ethical binds arising from these conflicts of interest. "In a case where a prosecutor represents an interested party, the ethics of the legal profession *require* that an interest other than the [U.S.] Government's be taken into account." *Id.* at 807 (emphasis in original).

Potential abuse of discovery inheres in the use of identical counsel for plaintiff and prosecutor in parallel criminal and civil proceedings. The fact that plaintiff's counsel is a state attorney general in no way mitigates this concern, as the same discovery methods are available. Again, in the case at bar, this concern became a reality as the NYAG used civil discovery materials to secure Petitioner's criminal conviction. Pet. at 7.[2]

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[2] The United States argues that the NYAG could have obtained the same information through criminal discovery. Opp. at 13. But the possession of civil discovery in hand would both motivate and guide the criminal discovery. Discovery is obviously much easier and more attractive when one already knows what one will find and where to look for it.

The appearance of impropriety is likewise not diminished by the fact that the plaintiff's attorney is a state government official. Indeed, the scandal to the public may be *greater* where the attorney wearing "two hats" is supposed to be an unbiased public servant. Thus, even aside from NYAG Abrams's undisputed use of the present prosecution for political reasons, Pet. at 6; Pet. App. 45a-46a, even aside from Abrams's outspoken abortion advocacy while litigating against a prominent pro-life activist, Pet. at 6; Pet. App. 34a, and even aside from Abrams's personal expression of animosity toward petitioner, Pet. at 6; Pet. App. 34a-36a (chanting "You are going to lose" and razzing Petitioner), the dual representation itself created an appearance of impropriety.

C. At bottom, the argument of the United States is that *Young* should not apply because "[a]n attorney general is the representative of a sovereign and acts on behalf of the public interest." Opp. at 11. This argument ignores the fact that the State of New York is a *different* sovereign from the United States. It is precisely this divergence of interests—which the United States concedes, Opp. at 11-12—that triggers the logic and the rule of *Young*.

There are doubtless some who are prepared to abandon the concept of federalism and declare the states to be mere puppets of the federal government with no independent or contrary interests. But that view betrays both the letter and spirit of the U.S. Constitution. The New York Attorney General, as representative of a distinct party with distinct interests, cannot accept appointment to prosecute a federal criminal contempt charge on behalf of the United States without running afoul of *Young*. Because the Second Circuit decision upheld this appointment, in conflict with *Young*, this Court should grant review.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

The United States argues that there is no conflict between the decision below and the decisions of other circuits. This claim is specious.

A. The United States points out that "no other court of appeals has addressed the application of [*Young*] to attorneys who represent a State." Opp. at 8. Assuming this to be true, there are still two important defects in this argument.

First, the decision below, refusing to apply *Young*, conflicts with the many other circuits correctly applying *Young*, *see* Pet. § II, unless the distinction between private party plaintiffs and state plaintiffs is of sufficient importance to negate the applicability of *Young*. In other words, the argument of the United States begs the merits of the question presented: the United States claims that the decision below does not conflict with other circuits because the decision below correctly distinguished *Young*, a contention refuted above. *Supra* § I.

Second, while Petitioner knows of no federal appellate decision addressing the particular application of *Young* to state attorneys general,[3] there *are* other circuits applying *Young* to *federal* government attorneys. Federal government lawyers obviously have a much stronger argument for escaping the *Young* rule: unlike state attorneys general, federal government attorneys represent the very same sovereign in both the civil suit and the criminal contempt proceedings. Nevertheless, the Fifth and Ninth Circuits have held that *Young* does limit the ability of courts to appoint even federal agency attorneys as prosecutors for related criminal contempt actions. *See* Pet. at 12-13. *A fortiori*, if the appointment in this case flunks

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[3] Presumably in other cases the courts and litigants knew about and correctly followed *Young* by avoiding such improper prosecutorial appointments.

the test for *federal* government attorneys, Pet. at 14-15, the appointment also flunks the no less stringent test for *state* government attorneys.

The decision below is therefore logically irreconcilable with the decisions of the Fifth and Ninth Circuits applying *Young* (albeit in somewhat modified form) to federal government attorneys.

B. The United States attempts to distinguish away the conflicting decisions of the Fifth and Ninth Circuits, quoting selected portions of the opinions. Opp. at 15-17. But these efforts ignore the plain language and holdings of these decisions.

As set forth in the Petition for Writ of Certiorari, both the Fifth and Ninth Circuits have ruled that where (as here) the appointed prosecutor was deeply involved in the underlying civil litigation and where (as here) the U.S. Attorney does not retain control of the contempt prosecution, the appointment is improper. Pet. at 14-15. *See United States ex rel. Securities & Exch. Comm'n v. Carter*, 907 F.2d 484, 487-88 (5th Cir. 1990); *Federal Trade Comm'n v. American Nat'l Cellular*, 868 F.2d 315, 320 (9th Cir. 1989). In the present case, the NYAG and his assistant acted as lead and exclusive counsel in both the civil suit and the criminal contempt prosecution. The U.S. Attorney deliberately had no involvement in, much less control over, the criminal contempt. Hence, the decision below would not pass muster with either the Fifth or Ninth Circuits.

CONCLUSION

"In *Young*, we instructed courts to request the United States Attorney to prosecute the criminal contempt charge, and, if the United States Attorney declined, to appoint as a special prosecutor *a private attorney other than the attorney for an interested party*." *United States v. Providence Journal Co.*, 485 U.S. 693, 696 n.3 (1988) (emphasis added). The district court failed to follow that instruction in the present case. The Second Circuit sustained that failure, thereby rendering a decision in conflict with this Court's decision in *Young* and with the decisions of other circuits. This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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